

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master In Equity

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S.C. Supreme Court

Opinion No. 2012-UP-603 (S.C. Ct. App. filed November 7, 2012)

Fidelity Bank,

Respondent,

v.

Cox Investment Group, LLC, Jeffrey E. Cox, Bobby E.
Lucas, Darren K. Lucas, and the Margate Tower At
Kingston Plantation Property Owners' Association, Inc.,

Defendants

Of Whom

Cox Investment Group, LLC, Jeffrey E. Cox, Bobby E.
Lucas, and Darren K. Lucas are

Petitioners

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master In Equity
Case No. 2009-CP-26-5479

Fidelity Bank,

Respondent,

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Lucas, Darren K. Lucas, and the Margate Tower At
Kingston Plantation Property Owners' Association, Inc.,

Defendants

Of Whom

Cox Investment Group, LLC, Jeffrey E. Cox, Bobby E.
Lucas, and Darren K. Lucas are

Appellants

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

FIDELITY BANK)

Plaintiff,)

vs.)

COX INVESTMENT GROUP, LLC,)
JEFFREY E. COX, BOBBY E. LUCAS,)
DARREN K. LUCAS, AND THE)
MARGATE TOWER AT KINGSTON)
PLANTATION PROPERTY OWNERS')
ASSOCIATION, INC.)

Defendant(s).)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2009-CP-26-5479

ORDER

(DEFICIENCY DEMANDED)

FILED
HORRY COUNTY
11 SEP 12 AM 11:36
CLERK OF COURT

 Pursuant to Rule 53, of the South Carolina Rules of Civil Procedure, the above-entitled matter was referred to the undersigned for the purpose of taking testimony and making a final decision in this matter, which decision shall be appealable to Section 14-11-85 of the Code of Laws of South Carolina, 1976, as amended. Pursuant to the Order of Default and Reference dated October 7, 2009, a hearing was held on June 16, 2011, which was attended by the Steve Wicker a representative from Fidelity Bank (hereinafter "Plaintiff"); Plaintiff's attorneys, Stephanie A. Grunthal, Esq. and W. Cliff Moore, III, Esq; Defendants Jeffrey E. Cox, Cox Investment Group, LLC, Bobby E. Lucas and Darren K. Lucas, and the Defendants' attorney William I. Diggs, Esq.

This is an action for the Reformation of a Mortgage and the Foreclosure of a Note and that reformed Mortgage (both terms are defined later in this Order).

The Defendants Cox Investment Group, LLC, Jeffrey E. Cox, Bobby E. Lucas and Darren K. Lucas filed an Answer to the Amended Complaint, examined witnesses at trial, made arguments at trial and filed a post-trial memorandum in which they advance the following positions.

1. It is not possible to reform the Mortgage and have that reformation subject third parties to a deficiency judgment under S.C. Code Ann §29-3-660.
2. An action for reformation of the Mortgage was not sufficiently pled.

3. An action for a judgment on the Note was not sufficiently pled.
4. The Mortgage does not secure the loan extensions and modifications.

The Defendants argue that the Plaintiff can not ask the Court to reform Mortgage and have the consequence of that reformation be that the individual defendants are subjected to a deficiency judgment resulting from the foreclosure of the reformed Mortgage. The Defendants do not succeed with this argument for two reasons.

First, an action for reformation of the Mortgage and an action for the foreclosure of the Mortgage are different causes of action that each must stand on their own merits. If the Plaintiff can prove the elements necessary for the Mortgage to be reformed, it is entitled to that relief. Then if the Plaintiff can prove that it is entitled to foreclose on the reformed Mortgage, it is entitled to that relief also, including the award of a deficiency judgment if that relief is appropriate. The reformation and foreclosure are not exclusive of each other.

S.C. Code Ann §29-3-660 (1976, as amended) allows for a deficiency to be established in a foreclosure action. It is not designed to direct or control the establishment of the Mortgage or the correction of mistakes made in the creation of the Mortgage. Nothing in the statute makes reference to reformation.

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Reformation of the Mortgage is appropriate if the Plaintiff can demonstrate a mistake that was mutual and that resulted in the omission or insertion of a material term. *George v. Empire Fire and Marine Insurance Company*, 344 S.C. 582, 545 S.E.2d 500 (2001). Nothing in the law establishing and defining the reformation cause of action references the foreclosure deficiency judgment statute.

The Plaintiff has made the required showing for the reformation of the mortgage. It has also made the required showing that the reformed mortgage should be foreclosed. Finally by the terms of the reformed Mortgage it has appropriately requested a deficiency judgment if the proceeds from the sale of the mortgaged property are insufficient to pay the amount due on the Note. The Plaintiff should not be precluded from receiving both of the reliefs requested.

Second, the reformed Mortgage is not the "covenant or obligation" that gives rise to the individual Defendants' liability for the deficiency judgment. That "covenant or

obligation" is the Note and its modifications. The individual Defendants are responsible for the entire debt due on the Note. By seeking a foreclosure the Plaintiff seeks to have the proceeds of the sale of the mortgaged property used to reduce the obligation for which the individual Defendants are responsible. Without the foreclosure and the establishment of a deficiency, the individual Defendants would be responsible for a much larger debt. Therefore, the foreclosure process benefits the individual Defendants. It does not harm them as they suggest.

I also find that reformation of a mortgage is appropriate when the party requesting the reformation can demonstrate a mistake that was mutual and that resulted in the omission or insertion of a material term. *George v. Empire Fire and Marine Insurance Company*, 344 S.C. 582, 545 S.E.2d 500 (2001). In paragraph 14 of the Amended Complaint filed May 10, 2010, ("Amended Complaint") the Plaintiff alleges that there was a mistake in the preparation of the mortgage – a "scrivener's error". In paragraph 15 of that same Amended Complaint, the Plaintiff alleges that the error was mutual. The Plaintiff clearly set out a cause of action for reformation.

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CH
At trial, the Plaintiff's custodian of records for the mortgage debt at issue testified that it was the intent of the Plaintiff to have Cox Investment mortgage its real property to secure the debt of Jeffrey E. Cox, Bobby E. Lucas and Darren K. Lucas. Jeffery E. Cox testified as manager of Cox Investment that as Cox Investment's manager, he intended to mortgage real property titled in the name of Cox Investment to secure the debt of Jeffrey E. Cox, Bobby E. Lucas and Darren K. Lucas. If the Mortgage offered in evidence at trial does anything other than secure the obligation of Jeffrey E. Cox, Bobby E. Lucas and Darren K. Lucas to the Plaintiff, it needs to be reformed to reflect the true intentions of the parties.

The Defendants suggest that the Plaintiff failed to ask for a judgment on the Note and that because of this error in pleadings, it is not entitled to a deficiency judgment against the individual Defendants. I believe the Defendants have misread the pleadings filed in this action.

Paragraphs 10, 11, and 12 of the Amended Complaint clearly set forth the Note and modifications that Jeffrey E. Cox, Bobby E. Lucas and Darren K. Lucas gave to the

Plaintiff. Paragraph 20 of the Amended Complaint sets out a default on the Note and alleges the amount that is due. In paragraph 24 of the Amended Complaint the Plaintiff states that it is entitled to an Order determining the amount due on the Note. Finally, in its Prayer, paragraph b., the Plaintiff asks for a judgment against the Defendants, jointly and severally, for the amount due on the Note. The request could not be clearer.

As to the contention that the Mortgage does not secure the loan extensions and modifications, the Court calls attention to the first paragraph of the Mortgage that clearly states:

This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the note; (b).....

As demonstrated by testimony at trial, the mortgage was never modified. The Note was the only document that was modified or extended. Cox Investment never was, and never needed to be, a signatory on the Note. It, therefore, is of no consequence that the Cox Investment did not sign the note modifications.

None of the defenses asserted by the identified Defendants should deny the Plaintiff the relief it requests in its Complaint.

After due deliberation upon the record, the evidence and argument presented, and the applicable law, I find, conclude and order the following.

FINDINGS OF FACT

I, therefore, find as follows:

1. The Lis Pendens was filed on June 4, 2009 and Amended May 4, 2010.
2. The Summons and Complaint were filed on June 4, 2009 and Amended May 4, 2010.
3. Service was made upon the Defendants as shown by the Affidavits of Service filed herein.
4. According to the Affidavit(s) filed herein, no Defendant in default is in the Military Service of the United States of America, as contemplated under The Soldier's and Sailor's Civil Relief Act of 1940, and any amendments thereto.

5. An Order of Default and Reference was filed herein, and this matter was referred to me as Master-in-Equity for Horry County for the purpose of taking testimony and making findings of fact and conclusions of law and to render a final decree with direct appeal to the South Carolina Supreme Court or the South Carolina Court of Appeals as provided by the South Carolina Appellate Court Rules and pursuant to Section 14-11-85 of the Code of Laws of South Carolina, 1976, as amended.

6. A hearing on this matter was held on June 16, 2011, at which testimony and exhibits were received from Steve Wicker, on behalf of the Plaintiff, and from Mr. Jeffrey Cox.

7. The Defendants' Counsel, William Issac Diggs, submitted a Post Trial Memorandum in Support of Judgment for Defendants. The Motion for Summary of Judgment for Defendants is denied.

AS TO THE FIRST CAUSE OF ACTION

(Reformation of Mortgage)

8. On October 3, 2007, Bobby E. Lucas, Darren K. Lucas and Jeffrey E. Cox made, executed and delivered to Fidelity Bank(hereinafter "Plaintiff") a certain Promissory Note, wherein for valuable consideration, Bobby E. Lucas, Darren K. Lucas and Jeffrey E. Cox promised to pay to the Plaintiff the original amount of Eight Hundred Sixty Thousand and 00/100 (\$860,000.00) Dollars pursuant to the terms and conditions of said Note.

9. Thereafter, on April 9, 2008, Bobby E. Lucas, Darren K. Lucas and Jeffrey E. Cox executed and delivered unto the Plaintiff that certain Note Modification Agreement extending the maturity date.

10. Thereafter, October 9, 2008, Bobby E. Lucas, Darren K. Lucas and Jeffrey E. Cox executed and delivered unto the Plaintiff that certain Note Modification Agreement extending the maturity date.

11. In order to secure such indebtedness, on October 3, 2007, the Defendant, Cox Investment Group, LLC, by and through Jeffrey E. Cox, Managing Member, executed a Mortgage of Real Estate (the "Mortgage") wherein it pledged as collateral certain real property commonly described as 8500 Margate Circle, Unit #1408, Myrtle Beach, SC, to secure repayment of all indebtedness under the Note.

12. Thereafter, the Mortgage was recorded on October 4, 2007, in the RMC/ROD Office for Horry, County in Book 4976 at Page 117.

13. The Mortgage loan is not owned, secured or guaranteed by Fannie Mae nor Freddie Mac and the Mortgage is not subject to modification under the Home Affordable Modification Program ("HMP").

14. The Mortgage contains a scrivener's error in that it inaccurately reflects that the "Borrower" is Cox Investments Group, LLC while the actual borrowers are Bobby E. Lucas, Darren K. Lucas and Jeffrey E. Cox. Cox Investment Group, LLC was the owner and holder of the real property described in the Mortgage at the time the Mortgage was executed and intended to give the Plaintiff a lien on the real property described as security for the Note described in this Complaint.

15. The identified scrivener's error was mutual among the parties.

16. Reformation of the Mortgage to correct this scrivener's error does not prejudice any party and would reflect the agreement among the parties.

17. The Plaintiff is entitled to an Order reforming the Mortgage to correct the scrivener's error.

AS TO THE SECOND CAUSE OF ACTION

(Foreclosure of Mortgage)

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18. Under the terms of the Note and Mortgage, the Defendants, promised to pay the Plaintiff the sum of \$860,000.00 Dollars, plus interest, costs and reasonable attorneys' fees. Other terms and conditions are stated in the Note and Mortgage, which are of record herein.

19. The Note and Mortgage provide that the borrowers will promptly pay the principal and interest evidenced by the Note at the time and in the manner therein provided.

20. According to the terms and conditions of the Note and Mortgage, it is provided that in the event of default in the payment of any installment when due, the entire principal and accrued interest shall at once become due and payable, at the option of the holders, and the mortgagee shall have power to sell said premises according to law and this Mortgage may be foreclosed and any such expenses and fees as may be incurred.

including the fees of any attorney employed by the mortgagee in any litigation or proceeding affecting said premises, shall be paid by the mortgagor and borrowers and secured by this instrument. And it is further agreed that in case the debt secured by the Mortgage or any part thereof is collected by suit or action, or the Mortgage be foreclosed, or put into the hands of an attorney for collection, suit, action or foreclosure, the said mortgagor and borrowers shall be chargeable with all costs of collection including reasonable attorneys fees, which charges and fees together with all costs and expenses, are hereby secured and may be recovered in any suit or action hereupon or hereunder.

21. The payments due on the Note and Mortgage, have not been made as provided for in the Note and Mortgage, and the Plaintiff, as the holder thereof, has elected to require immediate payment of the entire amount due thereon and has placed the Note and Mortgage in the hands of its attorneys herein for collection.

22. With respect to attorney fees, in view of the potential liabilities inherent in a real property matter, the attendant responsibilities, and the size of the mortgage debt, I find that a reasonable attorney's fee would be \$8,500.00. The Plaintiff engaged an attorney to foreclose the mortgage as expeditiously as possible, given the detriment to Plaintiff's equity position as a direct result of increasing losses from the running interest. It appears that the attorney examined the title to identify all parties having or claiming any interest in the subject real estate, the preparation of certain pleadings and other documents including the following:

- a. Lis Pendens;
- b. Summons and Complaint;
- c. Affidavit(s) of Service;
- d. Acknowledgment(s) of Service;
- e. Order of Reference;
- f. Notice(s) of Hearing;
- g. Record (Transcript) of Testimony; and
- h. Proposed Master-in-Equity's Report and Judgment of Foreclosure and Sale.

23. Additionally, the attorney prepared and served the pleadings upon the Defendants personally or by statutory/substitute service, provided reinstatement and payoff figures and payment histories as requested or required, and scheduled and attended the

hearing in this matter.

~~24.~~ Future duties include forwarding copies of the Judgment to appearing counsel, obtaining bidding instructions from Plaintiff or its designee, representing Plaintiff at the sale, preparing an Order of Sale or Report on Sale and Disbursements and Order Confirming Sale, and preparing the Master-in-Equity's Deed and any other documents necessary in this particular action.

25. In addition to the time invested to date, the Court anticipates a minimum of two (2) hours after the hearing. Moreover, depending upon the interest shown by the Defendants, third parties, or counsel for either and the inherent negotiations required thereby, other time may also be committed to the completion of the case.

26. In regard to the professional standing of counsel, representation of Plaintiff has been undertaken by the firm of CLAWSON & STAUBES, LLC. The attorneys primarily involved in this representation have been Kristen N. Nichols, R. Timothy Whisler and Stephanie A. Grunthal. They concentrate their practice in the areas of foreclosure, bankruptcy and commercial litigation.

~~27.~~ The fee requested is customary for the services provided, given the professional standing of Plaintiff's counsel. Also the Plaintiff's attorneys have achieved the beneficial result of a prompt foreclosure of the mortgage.

28. The amount due and owing on the Note and Mortgage, with interest at the rate provided in the Note, and other costs and expenses of collection, including attorneys fees secured by the Note and Mortgage are as follows:

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(a) Principal due as of August 8, 2011	<u>\$860,000.00</u>
(b) — Accrued Interest as of August 8, 2011	<u>\$123,636.95</u>
(c) Escrow Adjustments (debits or credits)	<u>\$0.00</u>
(d) Taxes, insurance, late fees, etc. not included in above	<u>\$43,580.99</u>
(e) Paid legal expenses and costs as of August 8, 2011	<u>\$16,559.96</u>
(f) Attorneys fees and costs due and owing Clawson and Staubes, LLC	<u>\$8,500.00</u>
Total debt secured by the Note and Mortgage, including interest to date shown:	<u>\$1,052,277.90</u>

Interest for the period from the date shown in (b) above through the date of this judgment at the rate of 5.00% per annum (\$119.44 per diem) (pursuant to the terms of the Note and Mortgage) to be added to the above stated "Total Debt" to comprise the amount of the judgment debt entered herein and interest after the date of judgment at the legal rate of interest for judgments on the judgment debt should be added to such judgment debt to comprise the amount of Plaintiff's debt secured by the Mortgage through the date to which such interest is computed.

29. The Plaintiff does not waive, but specifically demands judgment against the Defendants, Jeffrey E. Cox, Bobby E. Lucas and Darren K. Lucas, for the full amount found to be due to the Plaintiff on the Note and Mortgage held by the Plaintiff, with the right to enter personal judgment against the Defendants, Jeffrey E. Cox, Bobby E. Lucas and Darren K. Lucas, for any deficiency in this action remaining after sale of the mortgaged premises. Since a deficiency is demanded, the bidding will remain open for a period of thirty (30) days as prescribed by law.

30. The Defendant below named claims or may claim to have some interest in or lien upon the premises covered by the Plaintiff's Mortgage, or some part thereof, by virtue of the matters and things set forth below, but any such interest in or lien upon the said premises is junior and subordinate to the lien of the Plaintiff's Mortgage or does not attach to the property which is the subject of this action, or has been paid in full and not

satisfied of record, and in the event there is a surplus from the sale of the subject property, the validity, priority and amount of any such interest or lien will be determined at a hearing subsequent to the sale as prescribed by law. Said liens or interests are of record in the RMC Office for Clerk of Court's Office for Horry County and are described as follows:

- a. The Margate Tower at Kingston Plantation Property Owners' Association, Inc., by virtue of that certain Notice of Delinquent Assessments and Lien in favor of The Margate Tower at Kingston Plantation Property Owners' Association, Inc., filed with the Horry County Register of Deeds on May 21, 2009 in Deed Book 171 at Page 938.

The Plaintiff is informed and believes that the interest of the above named Defendant, if any is junior and subordinate to the lien of the Plaintiff's Mortgage.

CONCLUSIONS OF LAW

I, therefore, conclude as follows:

A. The Plaintiff is entitled to a Reformation of the Mortgage to correct the identified Scrivener's error, to list the actual ("Borrowers") on the mortgage as Bobby E. Lucas, Darren K. Lucas and Jeffrey E. Cox.

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B. — The Plaintiff's Mortgage constitutes a first (1st) lien on the subject real property, subject only to the lien for unpaid Horry County ad valorem taxes, if any, on the subject real property.

C. The Plaintiff should have judgment of foreclosure of its Mortgage.

D. The mortgaged property should be ordered sold at public auction after due advertisement. The sale shall be made subject to taxes and assessments that are due on the day of sale. That after making the required deposit the successful bidder at the sale should be required to pay interest at the legal rate of interest for judgments from the date of sale through the date of compliance.

E. The proceeds arising from such sale should be applied, first, to the costs and disbursements of this action, including attorney's fees, and next, to the payment and discharge of the amount of the Plaintiff's debt and interest or so much thereof as the proceeds will pay, and any surplus should be held pending further order of the Court.

F. If the proceeds of sale are insufficient to pay the amounts hereinbefore authorized to be paid out of said proceeds, with the interest, costs and disbursements as aforesaid, the parties hereto entitled to such deficiency have judgment therefor against the Defendants, Jeffrey E. Cox, Bobby E. Lucas and Darren K. Lucas.

Now, on motion of Plaintiff's attorney, Clawson and Staubes, LLC,

IT IS ORDERED, ADJUDGED AND DECREED, that the Plaintiff's Mortgage be reformed to correctly list the actual ("Borrowers") on the mortgage as Bobby E. Lucas, Darren K. Lucas and Jeffrey E. Cox.

IT IS ORDERED, ADJUDGED AND DECREED, that there is due to the Plaintiff on the Note and Mortgage set forth in the Complaint the sum of \$1,052,277.90 Dollars representing the "Total Debt" due Plaintiff as set out in Paragraph 28, *supra*, together with interest at the rate of 5.00% per annum (\$119.44 per diem) as provided in said Note on the balance of principal from the aforesaid date to the date hereof; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the amount due in the preceding paragraph (the "Total Debt" as set forth in Paragraph 28, *supra*, and later accrued interest on the principal) shall constitute the total judgment debt due the Plaintiff and shall bear interest hereafter at the legal rate of interest for judgments; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Defendants, Cox Investment Group, LLC, Jeffrey E. Cox, Bobby E. Lucas and Darren K. Lucas, on or before the date of sale of the property herein described, pay to the Plaintiff, or Plaintiff's attorney, the total amount due Plaintiff, together with the costs and disbursements of this action, including reasonable attorney's fees; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that on default of payment at or before the time herein indicated, the mortgaged premises described in the Lis Pendens and Complaint, be sold by the undersigned Master-in-Equity, at public auction, at the Horry County Courthouse, in the City of Conway, Horry County and State aforesaid, on some convenient sales day hereafter (and should the regular day of judicial sales fall on a legal holiday, then and in such event, the sales day shall be on Tuesday next succeeding such holiday), on the following terms, that is to say:

a. **FOR CASH:** the undersigned Master-in-Equity will require a deposit of Five (5%) Percent on the amount of the bid (in cash or equivalent), same to be applied on the purchase price only upon compliance with the bid, but in case of noncompliance within thirty (30) days same to be forfeited and applied to the costs and

Plaintiff's debt.

b. Interest on the balance of the bid shall be paid through the day of compliance at the legal rate of interest for judgments from the date of sale through the date of compliance.

c. The sale shall be subject to taxes and assessments, existing easements and restrictions of record.

d. Purchaser to pay for the preparation of the deed; deed stamps and costs of recording the deed; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that if Plaintiff is the successful bidder at said sale, for a sum not exceeding the amount of costs, expenses and the indebtedness due Plaintiff in full, Plaintiff may pay to the undersigned Master-in-Equity only the amount of the costs and expenses crediting the balance of the bid on the indebtedness due Plaintiff; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that a personal or deficiency judgment is being demanded, the bidding will remain open for thirty (30) days after the date of the initial sale as provided by law in such cases; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the undersigned Master-in-Equity, will by advertisement according to law, give notice of the time, and place of such sale, and the terms thereof and will execute to the purchaser, or purchasers, a deed to the premises sold. The Plaintiff, or any other party to this action, may become a purchaser at such sale, and that if, upon such sale being made, the purchaser, or purchasers, shall fail to comply with the terms thereof within thirty (30) days after date of sale, then the undersigned Master-in-Equity may advertise the said premises for sale on the next, or some other subsequent sale day, at the risk of the former highest bidder, and so from time to time thereafter until a full compliance shall be secured; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the undersigned Master-in-Equity apply the proceeds of the sale as follows:

First, to payment of the amount of the costs and expenses of this action, including attorney's fees, and any taxable disbursements by the attorneys in the action.

Next: to the payment to the Plaintiff or Plaintiff's attorney, of the amount of the debt and interest due Plaintiff or so much thereof as the purchase money will pay on the same.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that any surplus funds shall be held pending further Order of this Court; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that if the proceeds of the sale are insufficient to pay the amounts herein above authorized to be paid out of said proceeds, with the interest, costs and expenses as aforesaid, the parties hereto entitled to such deficiency have judgment therefor against the Defendants, Jeffrey E. Cox, Bobby E. Lucas and Darren K. Lucas; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that in the event the successful bidder is other than the Defendants in possession herein, upon the presentation of a Writ of Assistance, the Sheriff of Horry County is ordered and directed to eject and remove from the premises the occupants of the property sold, together with all personal property located thereon, and put the successful bidder or its assigns in full, quiet and peaceable possession of said premises without delay, and to keep said successful bidder or its assigns in such peaceable possession; a valid tenant shall have his/her rights protected pursuant to the Protecting Tenants at Foreclosure Act of 2009; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that each Defendant named herein, and all persons whosoever claiming under him, them or it be forever barred and foreclosed of all rights, title, interest, and equity of redemption in the said mortgaged premises so sold, or any part thereof; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the following is a description of the premises herein ordered to be sold:

Unit 1408 of Margate Tower at Kingston Plantation Horizontal Property Regime, established pursuant to Master Deed for Margate Tower at Kingston Plantation Horizontal Property Regime, dated August 9, 2004 and recorded August 13, 2004 in Deed Book 2776 at Page 573, and all Exhibits and Amendments thereto (the "Master Deed"), records of Horry County, South Carolina.

SUBJECT to all of the provisions of the aforesaid Master Deed and all Exhibits and Amendments thereto.

AND SUBJECT to all other restrictions, reservations, easements and rights of way of record, including those as set on the recorded map.

TOGETHER with all of the appurtenances thereto according to said Master Deed, and Exhibits and Amendments thereto, and the Grantee assumes and agrees to observe and perform its obligations under the Master Deed, and all Exhibits and Amendments thereto, including, but not limited to, the payment of

assessments for the maintenance and operation of the unit and condominium and subject to the provisions of the By-Laws of Margate Tower at Kingston Plantation Property Owners Association, Inc. and to the provisions of the Declaration of Covenants, Conditions, and Restrictions for Kingston Plantation and all exhibits and amendments thereto.

OCEANFRONT PROPERTY DISCLOSURE STATEMENT

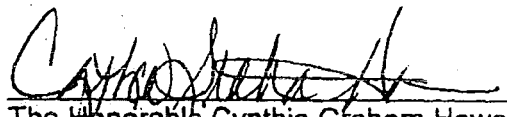
Pursuant to S.C. Code Ann. Section 48-39-33 (1988 Supp.), the Grantor discloses to the Grantee that the property or a portion thereof is or may be subject to statutory regulation imposed by The South Carolina Coastal Act of 1977, to S.C. Code Ann. Section 48-39-10 et seq. (1988 Supp.), hereinafter collectively called "the Acts". The Acts involve, and may subject the property to, the creation and existence of interim and final baselines, setback lines, the velocity zone and an erosion rate, all as is more fully defined in the Acts. Part or all of the property is or may be located seaward of the setback line, the minimum setback line or baseline, and has an erosion rate, all as determined by the South Carolina Office of Ocean and Coastal Resource Management ("OCRM"). The Acts may restrict the Grantee's right to build, repair or rebuild structures on the property. No structure may be constructed seaward of the setback line without a permit issued by the QCRM. Pursuant to the Acts, the locations of the baseline and setback lines on the property and the currently applicable erosion rate may be obtained from OCRM. The Grantor makes no representation to the Grantee concerning the location of such baselines, setback lines, or the velocity zone, the effect of such regulation on the property, or the accuracy of the foregoing disclosure.

14
GSH
This being the identical property conveyed to Cox Investments Group, LLC by Deed of William E. Green III and Carolyn K. Green by instrument dated April 13, 2007 and recorded April 18, 2007 in the Office of the Register of Deeds for Horry County, South Carolina in Deed Book 3237 at Page 2978.

TMS #: 166-06-41-354

Property Address: 8500 Margate Circle, Unit 1408, Myrtle Beach, SC 29572

AND IT IS SO ORDERED.


The Honorable Cynthia Graham Howe
Master-in-Equity for Horry County

Conway, South Carolina
August 29, 2011

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

FIDELITY BANK

Plaintiff,

vs.

COX INVESTMENT GROUP, LLC,
JEFFREY E. COX, BOBBY E. LUCAS,
DARREN K. LUCAS, AND THE MARGATE
TOWER AT KINGSTON PLANTATION
PROPERTY OWNERS' ASSOCIATION,
INC.

Defendant(s).

IN THE COURT OF COMMON PLEAS

CASE NO.: 2009-CP-26-5479

MASTER-IN-EQUITY'S NOTICE
OF SALE

(DEFICIENCY DEMANDED)

FILED
HORRY COUNTY
11 SEP 12 AM 10:36
CLERK OF COURT

BY VIRTUE of a Decree, I, The Honorable Cynthia Graham Howe, the undersigned, Master-in-Equity for Horry County, will sell on October 3, 2011, at 11:00 A.M., or shortly thereafter, at the HORRY COUNTY COURTHOUSE, 1301 Second Avenue, Conway, South Carolina, to the highest bidder for cash, at public auction, the premises fully described below:

- Unit 1408 of Margate Tower at Kingston Plantation Horizontal Property Regime, established pursuant to Master Deed for Margate Tower at Kingston Plantation Horizontal Property Regime, dated August 9, 2004 and recorded August 13, 2004 in Deed Book 2776 at Page 573, and all Exhibits and Amendments thereto (the "Master Deed"), records of Horry County, South Carolina.

SUBJECT to all of the provisions of the aforesaid Master Deed and all Exhibits and Amendments thereto.

AND SUBJECT to all other restrictions, reservations, easements and rights of way of record, including those as set on the recorded map.

TOGETHER with all of the appurtenances thereto according to said Master Deed, and Exhibits and Amendments thereto, and the Grantee assumes and agrees to observe and perform its obligations under the Master Deed, and all Exhibits and Amendments thereto, including, but not limited to, the payment of assessments for the maintenance and operation of the unit and condominium and subject to the provisions of the By-Laws of Margate Tower at Kingston Plantation Property Owners Association, Inc. and to the provisions of the Declaration of Covenants, Conditions, and Restrictions for Kingston Plantation and all exhibits and amendments thereto.

OCEANFRONT PROPERTY DISCLOSURE STATEMENT

Pursuant to S.C. Code Ann. Section 48-39-33 (1988 Supp.), the Grantor discloses to the Grantee that the property or a portion thereof is or may be subject to statutory regulation imposed by The South Carolina Coastal Act of 1977, to S.C. Code Ann. Section 48-39-10 et seq. (1988 Supp.), hereinafter collectively called "the Acts". The Acts involve, and may subject the property to, the creation and existence of interim and final baselines, setback lines, the velocity zone and an erosion rate, all as is more fully defined in the Acts. Part or all of the property is or may be located seaward of the setback line, the minimum setback line or baseline, and has an erosion rate, all as determined by the South Carolina Office of Ocean and Coastal Resource Management ("OCRM"). The Acts may restrict the Grantee's right to build, repair or rebuild structures on the property. No structure may be constructed seaward of the setback line without a permit issued by the QCRM. Pursuant to the Acts, the locations of the baseline and setback lines on the property and the currently applicable erosion rate may be obtained from OCRM. The Grantor makes no representation to the Grantee concerning the location of such baselines, setback lines, or the velocity zone, the

effect of such regulation on the property, or the accuracy of the foregoing disclosure.

This being the identical property conveyed to Cox Investments Group, LLC by Deed of William E. Green III and Carolyn K. Green by instrument dated April 13, 2007 and recorded April 18, 2007 in the Office of the Register of Deeds for Horry County, South Carolina in Deed Book 3237 at Page 2978.

TMS #: 166-06-41-354

Property Address: 8500 Margate Circle, Unit 1408, Myrtle Beach, SC 29572

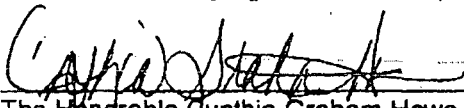
This sale shall be subject to taxes and assessments due on the day of such sale, existing easements and restrictions of record.

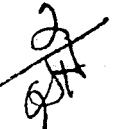
As a deficiency judgment is demanded, the bidding will remain open for a period of thirty (30) days after the date of sale as provided by law in such cases.

The property shall be sold for cash to the highest bidder. The highest bidder, other than the Plaintiff, will be required to deposit with the Master-in-Equity, at the conclusion of the bidding, cash or certified check in the amount of five (5%) percent of the bid: the said deposit to be applied to the purchase price in case of compliance, but to be forfeited and applied first to costs and then to Plaintiff's debt in case of non-compliance.

Should the highest bidder fail or refuse to make the required deposit at the time of the bid or comply with the other terms of the bid within thirty (30) days from the date of sale, the Master-in-Equity ~~will resell the property at the risk and expense of the defaulting bidder upon the same terms as above set out.~~ The Sheriff of Horry County may be authorized to put the purchaser into possession of the premises if requested by the purchaser.

Purchaser to pay for the preparation of the Master-in-Equity's Deed, documentary stamps on the deed, recording of the deed, and interest on the amount of the bid from the date of sale to date of compliance with the bid at the legal rate of interest for judgments (7.25% per annum).


The Honorable Cynthia Graham Howe
Master-in-Equity for Horry County


August 29, 2011
Conway, South Carolina

FOR INSERTION

Month & dates of Publication (3 consecutive weeks)
Beginning

Send bill as usual to
Stephanie A. Grunthal, Esquire
CLAWSON & STAUBES, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
Telephone: (843) 577-2026
Facsimile: (843) 722-2867

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NO.: 2009-CP-26-_____

Fidelity Bank,

Plaintiff,

v.

Cox Investments Group, LLC, Jeffrey E.
Cox, Bobby E. Lucas, Darren K. Lucas, and
The Margate Tower at Kingston Plantation
Property Owners' Association, Inc.,

Defendants.

NOTICE OF LIS PENDENS

HORRY COUNTY
09 JUN -2 PM 2:02
MELANIE HUGGINS
CLERK OF COURT

NOTICE IS HEREBY GIVEN that an action has been commenced and is now pending in the Court upon Complaint of the above-named Plaintiff against the above-named Defendant for foreclosure of property located in Horry County described as follows:

Unit 1408 of Margate Tower at Kingston Plantation Horizontal Property Regime, established pursuant to Master Deed for Margate Tower at Kingston Plantation Horizontal Property Regime, dated August 9, 2004 and recorded August 13, 2004 in Deed Book 2776 at Page 573, and all Exhibits and Amendments thereto (the "Master Deed"), records of Horry County, South Carolina.

SUBJECT to all of the provisions of the aforesaid Master Deed and all Exhibits and Amendments thereto.

AND SUBJECT to all other restrictions, reservations, easements and rights of way of record, including those as set on the recorded map.

TOGETHER With all of the appurtenances thereto according to said Master Deed, and Exhibits and Amendments thereto, and the Grantee assumes and agrees to observe and perform its obligations under the Master Deed, and all Exhibits and Amendments thereto, including, but not limited to, the payment of assessments for the maintenance and operation of the unit and condominium and subject to the provisions of the By-Laws of Margate Tower at Kingston Plantation Property Owners Association, Inc., and to the provisions of the Declaration of Covenants, Conditions, and Restrictions for

Kingston Plantation and all exhibits and amendments thereto.

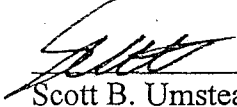
OCEANFRONT PROPERTY DISCLOSURE STATEMENT

Pursuant to S.C. Code Ann. Section 48-39-33 (1988 Supp.), the Grantor discloses to the Grantee that the property or a portion thereof is or may be subject to statutory regulation imposed by The South Carolina Coastal Act of 1977, to S.C. Code Ann. Section 48-39-10 et seq. (1988 Supp.), hereinafter collectively called "the Acts". The Acts involve, and may subject the property to, the creation and existence of interim and final baselines, setback lines, the velocity zone and an erosion rate, all as is more fully defined in the Acts. Part or all of the property is or may be located seaward of the setback line, the minimum setback line or baseline, and has an erosion rate, all as determined by the South Carolina Office of Ocean and Coastal Resource Management ("OCRM"). The Acts may restrict the Grantee's right to build, repair or rebuild structures on the property. No structure may be constructed seaward of the setback line without a permit issued by the OCRM. Pursuant to the Acts, the locations of the baseline and setback lines on the property and the currently applicable erosion rate may be obtained from OCRM. The Grantor makes no representation to the Grantee concerning the location of such baselines, setback lines, or the velocity zone, the effect of such regulation on the property, or the accuracy of the foregoing disclosure.

TMS #: 166-06-41-354

Property Address: 8500 Margate Circle, Unit 1408, Myrtle Beach, SC 29572

SCOTT B. UMSTEAD, P.A.



Scott B. Umstead

4226 Mayfair Street, Suite 100

Myrtle Beach, SC 29577

Ph: 843-913-4610

Attorney for Plaintiff

June 2, 2009
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS

) FIFTEENTH JUDICIAL CIRCUIT

) CIVIL ACTION NO.: 2009-CP-26-_____

Fidelity Bank,

Plaintiff,

v.

Cox Investments Group, LLC, Jeffrey E.

Cox, Bobby E. Lucas, Darren K. Lucas, and

The Margate Tower at Kingston Plantation

Property Owners' Association, Inc.,

Defendants.

**CERTIFICATE OF
EXEMPTION FROM ADR**

HORRY COUNTY
CLERK OF COURT
JUN -2 PM 2:02
MELANIE HUGGINS

I CERTIFY THAT THIS ACTION IS EXEMPT FROM ADR BECAUSE:

_____ this is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus or prohibition;

_____ this action is appellate in nature;

_____ this is a post-conviction relief matter;

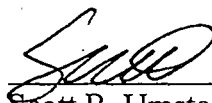
_____ this is a contempt of Court proceeding;

_____ this is a forfeiture proceeding by the State;

☒ this is a case involving a mortgage foreclosure; or lien for assessments;

_____ the parties submitted the case to voluntary mediation with a certified mediator prior to the filing of this civil action.

SCOTT B. UMSTEAD, P.A.



Scott B. Umstead

4226 Mayfair Street, Suite 100

Myrtle Beach, SC 29577

Ph: 843-913-4610

Attorney for Plaintiff

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

) FIFTEENTH JUDICIAL CIRCUIT

COUNTY OF HORRY

) CIVIL ACTION NO.: 2009-CP-26-_____

Fidelity Bank,

)

)

Plaintiff,

)

)

v.

)

SUMMONS

)

Cox Investments Group, LLC, Jeffrey E.

)

Cox, Bobby E. Lucas, Darren K. Lucas, and

)

The Margate Tower at Kingston Plantation

)

Property Owners' Association, Inc.,

)

)

Defendants.

)

)

HORRY COUNTY
CLERK OF COURT
MELANIE HUGGINS
09 JUN -2 PM 2:02

TO THE DEFENDANTS ABOVE NAMED:

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 said Complaint on the Plaintiff's attorney, Scott B. Umstead, 4226 Mayfair Street, Suite 100, Myrtle Beach, South Carolina, 29577, 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.

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, AN/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 the Mortgagee immediately and separately and such application will be deemed absolute and total in the

20 | Page

absence of your application for such an appointment within thirty (30) days after the service of the Summons and Complaint upon you.

YOU WILL ALSO TAKE NOTICE that under the provisions of South Carolina Code § 29-3-100, effective June 16, 1993, any collateral assignment of rents contained in the mortgage identified in the Complaint is hereby perfected and Plaintiff hereby gives further notice that all rents shall be payable directly to it by delivery of the same to its undersigned attorneys from the date of default forward. In the alternative, the Plaintiff will move a Judge of this Circuit Court on the tenth (10th) day after service hereof, or as soon as counsel for Plaintiff may be heard, for an Order enforcing the assignment of rents, if any, and/or profits, if any, compelling payments of all such funds covered by the mortgage and/or by status and/or by common law directly to the undersigned attorneys for the Plaintiff, which Motion is based upon the original Note and Mortgage identified in the Complaint therein and attached hereto as well as any applicable laws, statutes or regulations.

SCOTT B. UMSTEAD, P.A.



Scott B. Umstead
4226 Mayfair Street, Suite 100
Myrtle Beach, SC 29577
Ph: 843-913-4610
Attorney for Plaintiff

June 2, 2009
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS

) FIFTEENTH JUDICIAL CIRCUIT

) CIVIL ACTION NO.: 2009-CP-26-_____

Fidelity Bank,

Plaintiff,

v.

Cox Investments Group, LLC, Jeffrey E.
Cox, Bobby E. Lucas, Darren K. Lucas, and
The Margate Tower at Kingston Plantation
Property Owners' Association, Inc.,

Defendants.

COMPLAINT
(Foreclosure)
(Deficiency Demanded)
(Non-Jury)

HORRY COUNTY
09 JUN -2 PM 2:02
MELANIE HUGGINS
CLERK OF COURT

The Plaintiff, complaining of the above-named Defendants, would respectfully allege and show unto this Honorable Court as follows:

1. The Plaintiff is a corporation duly organized and existing pursuant to the statutory laws of the State of South Carolina and is doing business in, among others, Horry County, South Carolina.
2. The Defendant, Cox Investment Group, LLC (hereinafter "Cox Investment Group"), is a limited liability company organized and existing pursuant to the statutory laws of the State of South Carolina and is doing business in, among others, Horry County, South Carolina.
3. The Defendant, Jeffrey E. Cox, is, on information and belief, a citizen and resident of Horry County, South Carolina.
4. The Defendant, Bobby E. Lucas, is, on information and belief, a citizen and resident of Horry County, South Carolina.

22 | Page The Defendant, Darren K. Lucas, is, on information and belief, a citizen and

resident of Horry County, South Carolina.

6. The Defendant, The Margate Tower at Kingston Plantation Property Owners' Association, Inc., is a non-profit corporation organized and existing pursuant to the statutory laws of the State of South Carolina.
7. The property being foreclosed upon is located in Horry County, South Carolina, and this Court has jurisdiction over the parties and matters in controversy.
8. **The Mortgage loan is not owned, securitized or guaranteed by Fannie Mae or Freddie Mac and the Mortgage is not subject to modification under the Home Affordable Modification Program (HMP).**
9. This action is a foreclosure of a first mortgage and is not subject to the South Carolina Consumer Protection Code. Further, the Defendants are not members of the U.S. Military entitled to protection under the Soldiers' and Sailors' Act of 1940, as amended.
10. On October 3, 2007, Bobby E. Lucas, Darren K. Lucas and Jeffrey E. Cox executed and delivered unto the Plaintiff that certain Note attached hereto and incorporated herein by reference as Exhibit "A", wherein for valuable consideration, Bobby E. Lucas, Darren K. Lucas and Jeffrey E. Cox promised to pay to the Plaintiff the original amount of Eight Hundred Sixty Thousand and 00/100 (\$860,000.00) Dollars pursuant to the terms and conditions of said Note.
11. Thereafter, on April 9, 2008, Bobby E. Lucas, Darren K. Lucas and Jeffrey E. Cox executed and delivered unto the Plaintiff that certain Note Modification Agreement extending the maturity date.
12. Thereafter, October 9, 2008, Bobby E. Lucas, Darren K. Lucas and Jeffrey E. Cox

executed and delivered unto the Plaintiff that certain Note Modification Agreement extending the maturity date (attached hereto and incorporated herein by reference as Exhibit "B").

13. In order to secure such indebtedness, on October 3, 2007, Cox Investments Group made, executed and delivered to Plaintiff a Mortgage of Real Estate in writing covering real property in Horry County, South Carolina described as follows:

Unit 1408 of Margate Tower at Kingston Plantation Horizontal Property Regime, established pursuant to Master Deed for Margate Tower at Kingston Plantation Horizontal Property Regime, dated August 9, 2004 and recorded August 13, 2004 in Deed Book 2776 at Page 573, and all Exhibits and Amendments thereto (the "Master Deed"), records of Horry County, South Carolina.

SUBJECT to all of the provisions of the aforesaid Master Deed and all Exhibits and Amendments thereto.

AND SUBJECT to all other restrictions, reservations, easements and rights of way of record, including those as set on the recorded map.

TOGETHER With all of the appurtenances thereto according to said Master Deed, and Exhibits and Amendments thereto, and the Grantee assumes and agrees to observe and perform its obligations under the Master Deed, and all Exhibits and Amendments thereto, including, but not limited to, the payment of assessments for the maintenance and operation of the unit and condominium and subject to the provisions of the By-Laws of Margate Tower at Kingston Plantation Property Owners Association, Inc., and to the provisions of the Declaration of Covenants, Conditions, and Restrictions for Kingston Plantation and all exhibits and amendments thereto.

OCEANFRONT PROPERTY DISCLOSURE STATEMENT

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and has an erosion rate, all as determined by the South Carolina Office of Ocean and Coastal Resource Management ("OCRM"). The Acts may restrict the Grantee's right to build, repair or rebuild structures on the property. No structure may be constructed seaward of the setback line without a permit issued by the OCRM. Pursuant to the Acts, the locations of the baseline and setback lines on the property and the currently applicable erosion rate may be obtained from OCRM. The Grantor makes no representation to the Grantee concerning the location of such baselines, setback lines, or the velocity zone, the effect of such regulation on the property, or the accuracy of the foregoing disclosure.

TMS #: 166-06-41-354

Property Address: 8500 Margate Circle, Unit 1408, Myrtle Beach, SC 29572

The Mortgage described herein was recorded in the Office of the Register of Deeds for Horry County in Mortgage Book 4976 at Page 117, a copy being attached hereto and incorporated herein by reference as Exhibit "B".

14. The Defendants have defaulted under the terms and conditions of the said Note by failing to make the payments as required under such Note and Plaintiff has elected to declare the entire balance immediately due and payable pursuant to the terms of such Note and Mortgage. That after all credits being given the maker of said Note, there remains past due and owing to the Plaintiff the sum of Eight Hundred Eighty-Four Thousand Four Hundred Ninety-Eight and 06/100 (\$884,498.06) Dollars as of April 30, 2009 plus per diem in the amount of One Hundred Nineteen and 44/100 (\$119.44) Dollars.
15. Because of the default in payment of said Note, the Plaintiff has been forced to place this claim with Scott B. Umstead, attorney at law, to bring suit thereon.

16. The Note further provided that, in the even of default and in the event it was necessary to place said Note for collection with attorneys, the Defendants agreed to pay all reasonable attorney's fees and costs in connection herewith.
17. The following is a junior lienholder whose interest are being foreclosed in this action:
 - a. The Margate Tower at Kingston Plantation Property Owners' Association, Inc., by virtue of that certain Notice of Delinquent Assessments and Lien in Favor of The Margate Tower at Kingston Plantation Property Owners' Association, Inc. filed with the Horry County Register of Deeds on May 21, 2009 in Deed Book 171 at Page 938.
18. The Plaintiff is informed and believes it is entitled to an Order determining the amount due under the Note plus an award of collection expenses including reasonable attorney's fees and costs of this action. Plaintiff is entitled to an Order foreclosing the mortgage lien of the Plaintiff and ordering the public sale of the premises to satisfy the indebtedness due to the Plaintiff.

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

- a. That the amount due and owing upon the Note and Mortgage dated October 3, 2007 held by the Plaintiff be ascertained and determined under the direction of the Court, together with collection expenses, attorney's fees and the costs of the action, together with any redemption price paid by the Plaintiff and that Plaintiff be granted judgment against Defendants, jointly and severally, for such amount;
- b. That Plaintiff's aforescribed Mortgage be declared a first lien and the Plaintiff

have judgment of foreclosure for the amount so found to be due and owing thereon, together with any taxes or insurance premiums which may be due, with an award of collection expenses including attorney's fees and costs of this action as well as the price of redemption if paid by the Plaintiff; and

c. That the mortgaged premises and the personal property found thereon be sold under the discretion of this court, the equity of redemption being barred, and that the proceeds be applied as follows.

i. First, to the cost and expense of the within action and sale;

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

iii. Third, the surplus, if any, be distributed pursuant to SCRPC Rule 71(c).

d. That a deficiency judgment be entered against the Defendants, jointly and severally, in such amount as the Court may deem appropriate, and;

e. For such other and further relief as this Court deems just and proper.

SCOTT B. UMSTEAD, P.A.



Scott B. Umstead
4226 Mayfair Street, Suite 100
Myrtle Beach, SC 29577
Ph: 843-913-4610
Attorney for Plaintiff

June 2, 2009
Myrtle Beach, South Carolina

PROMISSORY NOTE

279537-372755

Principal	Loan Date	Maturity	Loan No	Call/ Coll	Account	Officer	Initials
\$860,000.00	10-03-2007	04-03-2008	0000372755			KRS02	

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

Borrower: BOBBY E LUCAS, DARREN K LUCAS and
JEFFREY E COX
2777 COX MILL RD
ASHEBORO, NC 27205

Lender: The Fidelity Bank
Ramseur Office
6858 Jordan Rd.
PO Box 188
Ramseur, NC 27316

Principal Amount: \$860,000.00

Initial Rate: 7.750%

Date of Note: October 3, 2007

PROMISE TO PAY. BOBBY E LUCAS, DARREN K LUCAS and JEFFREY E COX ("Borrower") jointly and severally promise to pay to The Fidelity Bank ("Lender"), or order, in lawful money of the United States of America, the principal amount of Eight Hundred Sixty Thousand & 00/100 Dollars (\$860,000.00), together with interest on the unpaid principal balance from October 3, 2007, until paid in full.

PAYMENT. Borrower will pay this loan in one principal payment of \$860,000.00 plus interest on April 3, 2008. This payment due on April 3, 2008, will be for all principal and all accrued interest not yet paid. Unless otherwise agreed or required by applicable law, payments will be applied to the following in the order specified: (i) unpaid credit insurance premiums, if any, accrued to the date of payment; (ii) unpaid interest accrued to the date of payment; and (iii) the unpaid principal balance. At Lender's option, any unpaid late charges, loan fees, prepayment penalties or other sums due may be satisfied from the payment received either (i) before the application of the payment in the foregoing manner, or (ii) after the application of the payment to the unpaid principal then due. The annual interest rate for this Note is computed on a 365/360 basis; that is, by applying the ratio of the annual interest rate over a year of 360 days, multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding. Borrower will pay Lender at Lender's address shown above or at such other place as Lender may designate in writing.

VARIABLE INTEREST RATE. The interest rate on this Note is subject to change from time to time based on changes in an index which is Lender's Prime Rate (the "Index"). This is the rate Lender charges, or would charge, on 90-day unsecured loans to the most creditworthy corporate customers. This rate may or may not be the lowest rate available from Lender at any given time. Lender will tell Borrower the current Index rate upon Borrower's request. The interest rate change will not occur more often than each day. Any change in the interest rate will take effect on the day the Index changes. Borrower understands that Lender may make loans based on other rates as well. The Index currently is 7.750% per annum. The interest rate to be applied to the unpaid principal balance during this Note will be at a rate equal to the Index, resulting in an initial rate of 7.750% per annum. **NOTICE:** Under no circumstances will the interest rate on this Note be more than (except for any higher default rate shown below) the lesser of 25.000% per annum or the maximum rate allowed by applicable law.

PREPAYMENT. Borrower agrees that all loan fees and other prepaid finance charges are earned fully as of the date of the loan and will not be subject to refund upon early payment (whether voluntary or as a result of default), except as otherwise required by law. Except for the foregoing, Borrower may pay without penalty all or a portion of the amount owed earlier than it is due. Early payments will not, unless agreed to by Lender in writing, relieve Borrower of Borrower's obligation to continue to make payments under the payment schedule. Rather, early payments will reduce the principal balance due. Borrower agrees not to send Lender payments marked "paid in full", "without recourse", or similar language. If Borrower sends such a payment, Lender may accept it without losing any of Lender's rights under this Note, and Borrower will remain obligated to pay any further amount owed to Lender. All written communications concerning disputed amounts, including any check or other payment instrument that indicates that the payment constitutes "payment in full" of the amount owed or that is tendered with other conditions or limitations or as full satisfaction of a disputed amount must be mailed or delivered to: The Fidelity Bank, PO Box 8 Fuquay Varina, NC 27626.

LATE CHARGE. If a payment is 15 days or more late, Borrower will be charged 4.000% of the unpaid portion of the regularly scheduled payment. This late charge shall be paid to Lender by Borrower to compensate Lender for Lender's extra costs and expenses caused by the late payment.

INTEREST AFTER DEFAULT. Upon default, including failure to pay upon final maturity, the interest rate on this Note shall be increased to 15.000% per annum ("Default Rate"). If judgment is entered in connection with this Note, interest will continue to accrue after the date of judgment at the Default Rate. However, in no event will the interest rate exceed the maximum interest rate limitations under applicable law.

DEFAULT. Each of the following shall constitute an event of default ("Event of Default") under this Note:

Payment Default. Borrower fails to make any payment when due under this Note.

Other Defaults. Borrower fails to comply with or to perform any other term, obligation, covenant or condition contained in this Note or in any of the related documents or to perform with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Borrower.

Default in Favor of Third Parties. Borrower or any Grantor defaults under any loan, extension of credit, security agreement, purchase or sales agreement, or any other agreement, in favor of any other creditor or person that may materially affect any of Borrower's property or Borrower's ability to repay this Note or perform Borrower's obligations under this Note or any of the related documents.

False Statements. Any warranty, representation or statement made or furnished to Lender by Borrower or on Borrower's behalf under this Note or the related documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

Death or Insolvency. The death of Borrower or the dissolution or termination of Borrower's existence as a going business, the insolvency of Borrower, the appointment of a receiver for any part of Borrower's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Borrower.

Creditor or Forfeiture Proceedings. Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Borrower or by any governmental agency against any collateral securing the loan. This includes a garnishment of any of Borrower's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Borrower as to the validity or reasonableness of the claim which is the basis of the creditor or forfeiture proceeding and if Borrower gives Lender written notice of the creditor or forfeiture proceeding and deposits with Lender monies or a surety bond for the creditor or forfeiture proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

Events Affecting Guarantor. Any of the preceding events occurs with respect to any guarantor, endorser, surety, or accommodation party of any of the indebtedness or any guarantor, endorser, surety, or accommodation party dies or becomes incompetent, or revokes or disputes the validity of, or liability under, any guaranty of the indebtedness evidenced by this Note.

Adverse Change. A material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of this Note is impaired.

Insecurity. Lender in good faith believes itself insecure.

LENDER'S RIGHTS. Upon default, Lender may declare the entire unpaid principal balance under this Note and all accrued unpaid interest immediately due, and then Borrower will pay that amount.

ATTORNEYS' FEES; EXPENSES. Lender may hire or pay someone else to help collect this Note if Borrower does not pay. Borrower will pay Lender that amount. This includes, subject to any limits under applicable law, Lender's reasonable attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including reasonable attorneys' fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. If not prohibited by applicable law, Borrower also will pay any court costs, in addition to all other sums provided by law.

GOVERNING LAW. This Note will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of North Carolina without regard to its conflicts of law provisions. This Note has been accepted by Lender in the State of North Carolina.

RIGHT OF SETOFF. To the extent permitted by applicable law, Lender reserves a right of setoff in all Borrower's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Borrower may open in the future. However, this does not include IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Borrower authorizes Lender, to the extent by applicable law, to charge or setoff all sums owing on the indebtedness against any and all such accounts, and, at Lender's discretion, administratively freeze all such accounts to allow Lender to protect Lender's charge and setoff rights provided in this paragraph.

SIMPLE INTEREST. This Note is a simple-interest note. Interest and credit insurance premiums (if applicable) continue to accrue until

PROMISSORY NOTE
(Continued)

Loan No: 0000372755

Page 2

are received by Lender. The payment schedule contained in this Note assumes that all payments will be made on the scheduled due dates.

SUCCESSOR INTERESTS. The terms of this Note shall be binding upon Borrower, and upon Borrower's heirs, personal representatives, successors and assigns, and shall inure to the benefit of Lender and its successors and assigns.

GENERAL PROVISIONS. If any part of this Note cannot be enforced, this fact will not affect the rest of the Note. Lender may delay or forgo enforcing any of its rights or remedies under this Note without losing them. Each Borrower understands and agrees that, with or without notice to Borrower, Lender may with respect to any other Borrower (a) make one or more additional secured or unsecured loans or otherwise extend additional credit; (b) alter, compromise, renew, extend, accelerate, or otherwise change one or more times the time for payment or other terms of any indebtedness, including increases and decreases of the rate of interest on the indebtedness; (c) exchange, enforce, waive, subordinate, fail or decide not to perfect, and release any security, with or without the substitution of new collateral; (d) apply such security and direct the order or manner of sale thereof, including without limitation, any non-judicial sale permitted by the terms of the controlling security agreements, as Lender in its discretion may determine; (e) release, substitute, agree not to sue, or deal with any one or more of Borrower's sureties, endorsers, or other guarantors on any terms or in any manner Lender may choose; and (f) determine how, when and what application of payments and credits shall be made on any other indebtedness owing by such other Borrower. Borrower and any other person who signs, guarantees or endorses this Note, to the extent allowed by law, waive presentment, demand for payment, and notice of dishonor. Upon any change in the terms of this Note, and unless otherwise expressly stated in writing, no party who signs this Note, whether as maker, guarantor, accommodation maker or endorser, shall be released from liability. All such parties agree that Lender may renew or extend (repeatedly and for any length of time) this loan or release any party or guarantor or collateral; or impair, fail to realize upon or perfect Lender's security interest in the collateral; and take any other action deemed necessary by Lender without the consent of or notice to anyone. All such parties also agree that Lender may modify this loan without the consent of or notice to anyone other than the party with whom the modification is made. The obligations under this Note are joint and several.

PRIOR TO SIGNING THIS NOTE, EACH BORROWER READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS NOTE, INCLUDING THE VARIABLE INTEREST RATE PROVISIONS. EACH BORROWER AGREES TO THE TERMS OF THE NOTE.

BORROWER ACKNOWLEDGES RECEIPT OF A COMPLETED COPY OF THIS PROMISSORY NOTE.

BORROWER:

x Bobby E Lucas
BOBBY E LUCAS

Darren K Lucas
DARREN K LUCAS

x Jeffrey E Cox
JEFFREY E COX

LENDER:

THE FIDELITY BANK

x [Signature]
Authorized Signer

LASER PMS Lending, Ver. 5.27.00.003 Copyright National Financial Institutions, Inc. 1997, 2007. All Rights Reserved. * NO FAX/LOAN/ALLOTT/PC TB-23680 PB-28

NOTE MODIFICATION AGREEMENT

Check one: ☐ PAD Loan ☐ AFS Loan ☐ Letter of Credit ☐ Checking Reserve

10/09/2008 372755 279537
Date of this Agreement Account # Obligor #
860,000.00 860,000.00 372755
Loan/Line Amount Current Balance Future/Current Obligation #

The "Note" is that note dated 10/03/2008 in the original principal sum of \$ 860,000.00 that evidences the loan identified above. The parties to this Note Modification Agreement (this "Agreement") are (i) The Fidelity Bank ("Lender"), and (ii) the undersigned parties, each of whom is obligated either as an original maker of the Note or as one who has assumed the obligations of an original maker (collectively, "Maker", whether one or more), or as a surety, guarantor, or endorser of the Note. Lender is the owner and holder of the Note. Maker has requested and Lender has agreed for the Note and other Loan Documents to be modified, subject to the terms and provisions of this Agreement. NOW, THEREFORE, for and in consideration of the premises, the parties to this Agreement agree that the terms of the Note and the other Loan Documents are modified, amended, renewed, extended and supplemented as of the date of this Agreement (unless otherwise specified) to effect the following changes to the loan transaction: (Complete Sections 1 and 2 entitled "Interest Rate" and "Payment Terms" in all cases. Subsections not completed are deleted. Sections 3, 4, and 5 apply only if completed.)

1. **INTEREST RATE.** Interest shall be calculated on an "Actual/360" daily simple interest basis unless the loan evidenced by the Note is subject to the federal Truth-In-Lending Act and its implementing regulations or the following box is checked ☐, in which case interest will be calculated on an "Actual/365" daily simple interest basis. Unless the default rate described in Section 7 below applies, interest shall accrue on the outstanding principal balance: (Complete Section 4 or B or Check C.)

(A) At the simple, fixed interest rate of _____ percent per annum.

(B) At the variable interest rate of 1.00 percentage points above (☐ or below, if checked) the Prime Rate established from time to time by The Fidelity Bank (the "Index Rate"). However, the interest rate will not at any time exceed the maximum rate of 18.00 percent per annum (or the maximum rate permitted by applicable law, whichever is less), or fall below the minimum rate of 5.00 percent per annum. The interest rate as of the date of this Agreement stated in simple interest terms is 5.50 percent per annum. The interest rate is subject to change on a daily basis with changes becoming effective on the calendar day of the Index Rate changes unless the following box is checked ☐, in which case the interest rate is subject to change on a monthly basis with changes becoming effective on the first day of each calendar month based on the Index Rate in effect on the last day of the preceding calendar month.

(C) ☐ See Exhibit A attached hereto and incorporated herein by reference for interest rate provisions.

2. **PAYMENT TERMS.** (Complete Section A or B or C or D or E or check F.)

(A) **Single Payment Loan - Principal and Interest Due at Maturity.** The outstanding principal balance and all accrued interest (and credit insurance premiums, if applicable) shall be payable in one single payment on 04/09/2009 (hereafter referred to as "Maturity").

(B) **Single Payment Loan - Interest Due Monthly, Principal Due at Maturity.** Interest shall be payable _____ (monthly, quarterly, semi-annual, etc.) beginning _____ and consecutively on the same day of each such calendar period thereafter, with any accrued but unpaid interest and unpaid principal (and credit insurance premiums, if applicable) due in full on _____ (hereafter referred to as "Maturity").

(C) **Balloon Payments.** The outstanding principal balance and accrued interest (and credit insurance premiums, if applicable) shall be payable in _____ equal consecutive _____ (monthly, quarterly, semi-annual, etc.) payments of \$ _____ each commencing on _____ (the "Regular Payment Commencement Date") and on the same day of each such calendar period thereafter and one final payment of \$ _____ due on _____ (hereafter referred to as "Maturity"), unless sooner paid. The periodic payment amount specified includes principal and interest (and credit insurance premiums, if applicable).

(D) **Principal Plus Interest Payments.** Principal payments shall be payable in _____ equal consecutive _____ (monthly, quarterly, semi-annual, etc.) payments of \$ _____ each commencing on _____ and on the same day of each such calendar period thereafter. In addition, _____ (monthly, quarterly, semi-annual, etc.) interest payments will be made on the same day of each such calendar period. One final payment of the entire balance (principal and interest) shall be due on _____ (hereafter referred to as "Maturity").

(E) **Installment Payments.** The outstanding principal balance and accrued interest (and credit insurance premiums, if applicable) shall be payable in _____ equal consecutive _____ (monthly, quarterly, semi-annual, etc.) payments of \$ _____ each commencing on _____ (the "Regular Payment Commencement Date") and on the same day of each such calendar period thereafter and one final payment of same amount due on _____ (hereafter referred to as "Maturity"), unless sooner paid. The periodic payment amount specified includes principal and interest (and credit insurance premiums, if applicable).

(F) **Other.** ☐ See Exhibit A attached hereto and incorporated herein by reference for payment terms.

3. **FEES.** Loan fees and/or discount points in the aggregate amount of \$ 500.00 are due and payable to Lender upon the signing of this Agreement.

4. **ADDITIONAL COLLATERAL.** All collateral securing the Note shall remain as collateral for the Note unless and until expressly released by Lender. The following ADDITIONAL collateral and/or instruments is/are being given to secure repayment of the Note:

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5. OTHER MODIFICATIONS:

6. **INTEREST AFTER DEFAULT.** After an event of default occurs (including failure to pay at Maturity), Lender may, at its option and without notice to any obligor (except for any notice required by applicable law), increase the interest rate on the Note one or more times to a rate or rates (each a "default rate") to be determined by Lender in its sole discretion. However, (a) the default rate shall never exceed the lesser of 15% per annum or the maximum interest rate permitted by applicable law, and (b) Lender will not increase the interest rate to a default rate if doing so is prohibited by applicable law or if this loan is subject to the federal Truth-In-Lending Act and its implementing regulations. If the default is subsequently cured, Lender may, at its option and without notice to any obligor, reduce the interest rate on the Note to the rate that would then have applied had no event of default occurred. To the extent permitted by applicable law, the interest rate provided for herein (including any default rate then in effect) or the legal rate of interest on judgments, whichever is greater, shall apply to any indebtedness due following the entry of a judgment relating to the collection of this loan.

7. **PRIME RATE.** Lender's "Prime Rate" of interest, as that term is used in this Agreement, means that rate established from time to time by Lender and identified as such within Lender's offices. The term "Prime Rate" is used as a means of identifying a rate of interest index and is not a representation by Lender that the Prime Rate is necessarily the lowest or most favorable rate of interest offered by Lender to borrowers generally, and no one shall have any claim or right of action based on such premise.

8. **VARIABLE RATE/NEGATIVE AMORTIZATION.** If the interest rate increases during the term of the Note and/or any fixed payment amount required to be paid by the terms of the Note is at any time insufficient to pay the periodic accruals of interest (and credit insurance premiums, if applicable), Lender may (a) increase the amount of the periodic payments to have the loan fully amortized at Maturity, (b) increase the amount of the periodic payments as necessary to pay all accruals of interest (and credit insurance premiums, if applicable) for the current period and from previous periods to avoid negative amortization and/or minimize the impact of negative amortization, (c) extend the Maturity and require additional supplemental periodic payments, (d) require the resulting increase to be paid at Maturity, or (e) select or designate any combination of the foregoing, all in Lender's discretion as determined from time to time by Lender. However, if this loan is subject to the federal Truth-In-Lending Act and its implementing regulations, the provisions of this section shall not be enforced in conflict with disclosures given pursuant thereto.

9. **INTEREST CALCULATION METHOD.** Interest that is calculated on an "Actual/360" daily simple interest basis is determined by applying the ratio of the annual interest rate over a year of 360 days, multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding. Interest that is calculated on an "Actual/365" daily simple interest basis is determined by applying the ratio of the annual interest rate over a year of 365 days, multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding.

10. **MISCELLANEOUS.** The term "Note" refers to the original Note identified on the front of this Agreement. The term "Loan Documents" includes all documents signed and delivered in connection with the loan transaction evidenced by the Note (including the Note, each security instrument, any loan commitment letters, any loan agreements and all loan application documents), whether now existing or hereafter arising. The terms "Note" and "Loan Documents" include all amendments, modifications, extensions, renewals and increases thereof. All of the Loan Documents are hereby modified, amended, renewed, extended and supplemented to the extent necessary to effect the changes to the loan transaction specified in this Agreement. The Note, as modified by this Agreement, shall be the joint and several obligation of each maker, regardless of whether such maker was an original maker of the Note. This Agreement shall be binding upon, and inure to the benefit of, the parties to this Agreement and their respective successors-in-interest. This Agreement is not a novation; rather, it constitutes a modification to the terms of an existing contractual relationship between the parties and is not intended as a cancellation of the original debt or the creation of a new debt. The terms and provisions of the Note and other Loan Documents not expressly modified by this Agreement (including, for example, any provision for late charges) shall continue in full force and effect. The terms of the Note and Loan Documents, as modified by this Agreement, are in all respects ratified and confirmed and shall continue in full force and effect.

IN WITNESS WHEREOF, each of the undersigned has hereunto set his or her hand and seal or caused this Agreement to be signed and sealed in its name by a person or persons duly authorized, all as of the date of this Agreement.

BUSINESS ENTITY:

Name of Business Entity _____ (SEAL)

By: _____ (SEAL)

Title: _____ (SEAL)

By/Attest: _____ (SEAL)

Title: _____ (SEAL)

Accepted: The Fidelity Bank

By: _____

Sales Associate No. 3254 Cost Ctr. 031

INDIVIDUAL(S):

_____ (SEAL)

Type Name: Bobby E. Lucas

_____ (SEAL)

Type Name: Darren K. Lucas

_____ (SEAL)

Type Name: Jeffrey Cox

_____ (SEAL)

Type Name:

☐ See Signature Addendum for signature(s) of additional party(ies).

07-HW-14378/Cox Investments

Instrument#: 2007000141150, MTG BK:
4976 PG: 117 DOCTYPE: 002 10/04/2007
at 03:17:02 PM, 1 OF 9
BALLERY V. SKIPPER, HORRY COUNTY,
SC REGISTRAR OF DEEDS

----- [Space Above This Line For Recording Data] -----

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279537-372735

MORTGAGE

THIS MORTGAGE ("Security Instrument") is given on 10/03/07. The mortgagor is Cox Investments Group, LLC ("Borrower"). This Security Instrument is given to Fidelity Bank who is organized under the laws of the United States of America, and whose address is 6856 Jordan Road, Ramseur, NC 27316 ("Lender"). Borrower owes Lender the principal sum of Eight Hundred Sixty Thousand and 00/100 Dollars (U.S.\$860,000.00). This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which provides for monthly payments, with the full debt, if not paid earlier, due and payable on 4/3/2008. This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the note; (b) the payment of all other sums, with interest, advanced under paragraph 7 to protect the security of this Security Instrument; and (c) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to Lender and Lender's successors and assigns the following described property located in Horry County, South Carolina.

SEE ATTACHED EXHIBIT A FOR LEGAL DESCRIPTION

which has the address of

8500 Margate Circle Unit # 1408
Myrtle Beach, SC 29572

TO HAVE AND TO HOLD this property unto Lender and Lender's successors and assigns, forever, together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. **Payment of Principal and Interest; Prepayment and Late Charges.** Borrower shall promptly pay when due the principal of and interest on the debt evidenced by the Note and any prepayment and late charges due under the Note.

Initials: XL @ L



Exhibit A

Unit 1408 of Margate Tower at Kingston Plantation Horizontal Property Regime, established pursuant to Master Deed for Margate Tower at Kingston Plantation Horizontal Property Regime, dated August 9, 2004 and recorded August 13, 2004 in Deed Book 2776 at Page 573, and all Exhibits and Amendments thereto (the "Master Deed"), records of Horry County, South Carolina.

SUBJECT to all of the provisions of the aforesaid Master Deed and all Exhibits and Amendments thereto.

AND SUBJECT to all other restrictions, reservations, easements and rights of way of record, including those as set on the recorded map.

TOGETHER with all of the appurtenances thereto according to said Master Deed, and Exhibits and Amendments thereto, and the Grantee assumes and agrees to observe and perform its obligations under the Master Deed, and all Exhibits and Amendments thereto, including, but not limited to, the payment of assessments for the maintenance and operation of the unit and condominium and subject to the provisions of the By-Laws of Margate Tower at Kingston Plantation Property Owners Association, Inc. and to the provisions of the Declaration of Covenants, Conditions, and Restrictions for Kingston Plantation and all exhibits and amendments thereto.

This being the identical property conveyed to Cox Investments Group, LLC by Deed of William E. Green III and Carolyn K. Green by instrument dated April 13, 2007 and recorded April 18, 2007 in the Office of the Register of Deeds for Horry County, South Carolina in Deed Book 3237 at Page 2978.

2. **Funds for Taxes and Insurance.** Subject to applicable law or to a written waiver by Lender, Borrower shall pay to Lender on the day monthly payments are due under the Note, until the Note is paid in full, a sum ("Funds") for: (a) yearly taxes and assessments which may attain priority over this Security Instrument as a lien on the property; (b) yearly leasehold payments or ground rents on the Property, if any; (c) yearly hazard or property insurance premiums; (d) yearly flood insurance premiums, if any; (e) yearly mortgage insurance premiums, if any; and (f) any sums payable by Borrower to Lender, in accordance with the provisions of paragraph 8, in lieu of the payment of mortgage insurance premiums. These items are called "Escrow Items." Lender may, at any time, collect and hold Funds in an amount not to exceed the maximum amount a lender for a federally related mortgage loan may require for Borrower's escrow account under the federal Real Estate Settlement Procedures Act of 1974 as amended from time to time, 12 U.S.C. Section 2601 et seq. ("RESPA"), unless another law that applies to the Funds sets a lesser amount. If so, Lender may, at any time, collect and hold Funds in an amount not to exceed the lesser amount. Lender may estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with applicable law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is such an institution) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items. Lender may not charge Borrower for holding and applying the Funds, annually analyzing the escrow account or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and applicable law permits Lender to make such a charge. However, Lender may require Borrower to pay a one-time charge for an independent real estate tax reporting service used by Lender in connection with this loan, unless applicable law provides otherwise. Unless an agreement is made or applicable law requires interest to be paid, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender may agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds, showing credits and debits to the Funds and the purpose for which each debit to the Funds was made. The Funds are pledged as additional security for all sums secured by this Security Instrument.

If the Funds held by Lender exceed the amounts permitted to be held by applicable law, Lender shall account to Borrower for the excess Funds in accordance with the requirements of applicable law. If the amount of the Funds held by Lender at any time is not sufficient to pay the escrow items when due, Lender may so notify Borrower in writing, and, in such case Borrower shall pay to Lender the amount necessary to make up the deficiency. Borrower shall make up the deficiency in no more than twelve monthly payments, at Lender's sole discretion.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender. If, under paragraph 21, Lender shall acquire or sell the Property, Lender, prior to the acquisition or sale of the Property, shall apply any Funds held by Lender at the time of acquisition or sale as a credit against the sums secured by this Security Instrument.

3. **Application of Payments.** Unless applicable law provides otherwise, all payments received by Lender under paragraphs 1 and 2 shall be applied: first, to any prepayment charges due under the Note; second, to amounts payable under paragraph 2; third, to interest due; fourth, to principal due; and last, to any late charges due under the Note.

4. **Charges; Liens.** Borrower shall pay all taxes, assessments, charges, fines and impositions attributable to the Property which may attain priority over this Security Instrument, and leasehold payments or ground rents, if any. Borrower shall pay these obligations in the manner provided in paragraph 2, or if not paid in that manner, Borrower shall pay them on time directly to the person owed payment. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this paragraph. If Borrower makes these payments directly, Borrower shall promptly furnish to Lender receipts evidencing the payments.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender; (b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings which in the Lender's opinion operate to prevent the enforcement of the lien; or, (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this

Unless Lender and Borrower otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of the monthly payments referred to in paragraphs 1 and 2 or change the amount of such payments.

11. Borrower Not Released; Forbearance By Lender Not a Waiver.

Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to any successor in interest of Borrower shall not operate to release the liability of the original Borrower or Borrower's successors in interest. Lender shall not be required to commence proceedings against any successor in interest or refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or Borrower's successors in interest. Any forbearance by Lender in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.

12. Successors and Assigns Bound; Joint and Several Liability; Co-signers. The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower, subject to the provisions of paragraph 17. Borrower's covenants and agreements shall be joint and several. Any borrower who co-signs this Security Instrument but does not execute the Note: (a) is co-signing this Security Instrument only to mortgage, grant and convey that Borrower's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower may agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without that Borrower's consent.

13. Loan Charges. If the loan secured by this Security Instrument is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge under the Note.

14. Notices. Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender. Any notice to Lender shall be given by first class mail to Lender's address stated herein or any other address Lender designates by notice to Borrower. Any notice provided for in this Security Instrument shall be deemed to have been given to Borrower or Lender when given as provided in this paragraph.

15. Governing Law; Severability. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Security Instrument or the Note conflict with applicable law, such conflict shall not affect other provision of this Security Instrument or the Note which can be given effect without the conflicting provision. To this end the provisions of this Security Instrument and the Note are declared to be severable.

16. Borrower's Copy. Borrower shall be given one conformed copy of the Note and of this Security Instrument.

17. Transfer of the Property or a Beneficial Interest in Borrower. If all or any part of the Property or any interest in it is sold or transferred (or if a Beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by federal law as of the date of this Security Instrument.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is delivered or mailed within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these

sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

18. Borrower's Right To Reinstate. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earlier of: (a) 5 days (or such other period as applicable law may specify for reinstatement) before sale of the Property pursuant to any power of sale contained in this Security Instrument; or (b) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees; and (d) takes such action as Lender may reasonably require to assure that the lien of this Security Instrument, Lender's rights in the Property and Borrower's obligation to pay the sums secured by this Security Instrument shall continue unchanged. Upon reinstatement by Borrower, this Security Instrument and the obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under paragraph 17.

19. Sale of Note; Change of Loan Servicer. The Note or a partial interest in the Note (together with this Security Instrument) may be sold one or more times without prior notice to Borrower. A sale may result in a change in the entity (known as the "Loan Servicer") that collects monthly payments due under the Note and this Security Instrument. There also may be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change in accordance with paragraph 14 above and applicable law. The notice will state the name and address of the new Loan Servicer and the address to which payments should be made. The notice will also contain any other information required by applicable law.

20. Hazardous Substances. Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property that is in violation of any Environmental Law. The proceeding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property.

Borrower shall promptly give Lender written notice of any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge. If Borrower learns, or is notified by any governmental or regulatory authority, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law.

As used in this paragraph 20, "Hazardous Substances" are those substances defined as toxic or hazardous substances by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials. As used in this paragraph 20, "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or Environmental protection. **NON-UNIFORM COVENANTS.** Borrower and Lender further covenant and agree as follows:

21. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under paragraph 17 unless applicable law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or

any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the specified date in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies

provided in this paragraph 21, including, but not limited to, reasonable attorneys' fees and costs of title evidence, all of which shall be additional sums secured by this Security Instrument.

22. Release. Upon payment of all sums secured by this Security Instrument, this Security Instrument shall become null and void. Lender shall release this Security Instrument without charge to Borrower. Borrower shall pay any recordation costs.

23. Waivers. Borrower waives all rights of homestead exemption in the Property. Borrower waives the right to assert any statute providing appraisal rights which may reduce any deficiency judgment obtained by Lender against Borrower in the event of foreclosure under this Security Instrument.

24. Future Advances. The lien of this Security Instrument shall secure the existing indebtedness under the Note and any future advances made under this Security Instrument up to one hundred fifty percent (150%) of the original principal amount of the Note plus interest thereon, attorneys' fees and court costs.

25. Riders to this Security Instrument. If one or more riders are executed by Borrower and recorded together with this Security Instrument, the covenants and agreements of each such rider shall be incorporated into and shall amend and supplement the covenants and agreements of this Security Instrument as if the rider(s) were a part of this Security Instrument.

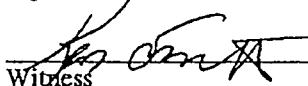
[Check applicable box(es)]

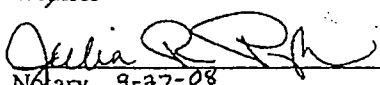
- ☐ Adjustable Rate Rider
- ☐ Condominium Rider
- ☐ 1-4 Family Rider
- ☐ Graduated Payment Rider
- ☐ Planned Unit Development Rider
- ☒ Other(s):

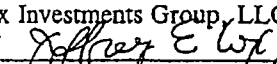
- ☐ Weekly Payment Rider
- ☐ Balloon Rider
- ☐ Rate Improvement Rider
- ☐ Second Home Rider
- ☐ V.A. Rider

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any rider(s) executed by Borrower and recorded with it.

Signed, sealed and delivered in the presence of:


Witness


Notary 9-27-08

Cox Investments Group, LLC
BY 
ITS Managing Member

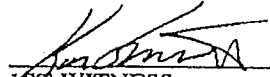
Initials: 

STATE OF NORTH CAROLINA)

) PROBATE

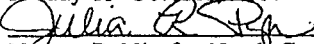
COUNTY OF HORRY)

Personally appeared before me, the undersigned witness, and made oath that he/she saw the within named Mortgagor(s) Sign, Seal and as his, her and their (as the case may be) act and deed deliver the within written Mortgage; and that he/she with the other witness subscribed above witnessed the execution thereof.


NOTARY WITNESS

Sworn to before me this

3rd day of October, 2007


Notary Public for North Carolina

My commission Expires Sept 27, 2008

Initials: jc B.L. Gf.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NO.: 2009-CP-26-5479

Fidelity Bank,

Plaintiff,

v.

Cox Investments Group, LLC, Jeffrey E.
Cox, Bobby E. Lucas, Darren K. Lucas, and
The Margate Tower at Kingston Plantation
Property Owners' Association, Inc.,

Defendants.

AMENDED SUMMONS

HORRY COUNTY
10 MAY -4 PM 1:34
CLERK OF COURT

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Amended Complaint on the Plaintiff's attorney, Scott B. Umstead, 4226 Mayfair Street, Suite 100, Myrtle Beach, South Carolina, 29577, within fifteen (15) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Amended Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Amended Complaint.

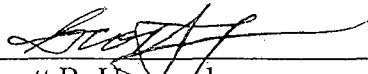
TO MINOR(S) OVER FOURTEEN YEARS OF AGE, AND/OR TO MINOR(S) UNDER FOURTEEN YEARS OF AGE AND THE PERSON WITH WHOM THE MINOR(S) RESIDES, AND/OR TO PERSONS UNDER SOME LEGAL DISABILITY:

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 the Mortgagee immediately and separately and such application will be deemed absolute and total in the absence of your application for such an appointment within thirty (30) days after the service of the Summons and Amended Complaint upon you.

YOU WILL ALSO TAKE NOTICE that under the provisions of South Carolina Code § 29-3-100, effective June 16, 1993, any collateral assignment of rents contained in the mortgage

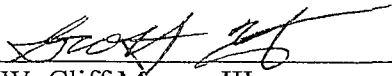
identified in the Amended Complaint is hereby perfected and Plaintiff hereby gives further notice that all rents shall be payable directly to it by delivery of the same to its undersigned attorneys from the date of default forward. In the alternative, the Plaintiff will move a Judge of this Circuit Court on the tenth (10th) day after service hereof, or as soon as counsel for Plaintiff may be heard, for an Order enforcing the assignment of rents, if any, and/or profits, if any, compelling payments of all such funds covered by the mortgage and/or by status and/or by common law directly to the undersigned attorneys for the Plaintiff, which Motion is based upon the original Note and Mortgage identified in the Amended Complaint therein and attached hereto as well as any applicable laws, statutes or regulations.

SCOTT B. UMSTEAD, P.A.



Scott B. Umstead
4226 Mayfair Street, Suite 100
Myrtle Beach, SC 29577
Ph: 843-913-4610
Attorney for Plaintiff

ELLIS, LAWHORNE & SIMS, P.A.

for 

W. Cliff Moore, III
P.O. Box 2285
Columbia, SC 29205
(803) 212-4956
cmoore@ellislawhorne.com
Attorney for the Plaintiff

May __, 2010
Myrtle Beach, South Carolina

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NO.: 2009-CP-26-5479

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100-443887-100
 MAY -4 PM 1:34
 CLERK OF COURT

1. The Plaintiff is a corporation duly organized and existing pursuant to the statutory laws of the State of South Carolina and is doing business in, among others, Horry County, South Carolina.
2. The Defendant, Cox Investment Group, LLC (hereinafter “Cox Investment Group”), is a limited liability company organized and existing pursuant to the statutory laws of the State of South Carolina and is doing business in, among others, Horry County, South Carolina.
3. The Defendant, Jeffrey E. Cox, is, on information and belief, a citizen and resident of Horry County, South Carolina.
4. The Defendant, Bobby E. Lucas, is, on information and belief, a citizen and

resident of Horry County, South Carolina.

5. The Defendant, Darren K. Lucas, is, on information and belief, a citizen and resident of Horry County, South Carolina.
6. The Defendant, The Margate Tower at Kingston Plantation Property Owners' Association, Inc., is a non-profit corporation organized and existing pursuant to the statutory laws of the State of South Carolina.
7. The real property that is the subject of this action is located in Horry County, South Carolina, and this Court has jurisdiction over the parties and matters in controversy.
8. **The Mortgage loan at issue in this action is not owned, securitized or guaranteed by Fannie Mae or Freddie Mac and the Mortgage is not subject to modification under the Home Affordable Modification Program (HMP).**
9. The Defendants are not members of the U.S. Military entitled to protection under the Soldiers' and Sailors' Act of 1940, as amended.
10. On October 3, 2007, Bobby E. Lucas, Darren K. Lucas and Jeffrey E. Cox executed and delivered unto the Plaintiff that certain Note attached hereto and incorporated herein by reference as Exhibit "A", wherein for valuable consideration, Bobby E. Lucas, Darren K. Lucas and Jeffrey E. Cox promised to pay to the Plaintiff the original amount of Eight Hundred Sixty Thousand and 00/100 (\$860,000.00) Dollars pursuant to the terms and conditions of said Note.
11. Thereafter, on April 9, 2008, Bobby E. Lucas, Darren K. Lucas and Jeffrey E. Cox executed and delivered unto the Plaintiff that certain Note Modification Agreement extending the maturity date.

12. Thereafter, October 9, 2008, Bobby E. Lucas, Darren K. Lucas and Jeffrey E. Cox executed and delivered unto the Plaintiff that certain Note Modification Agreement extending the maturity date (attached hereto and incorporated herein by reference as Exhibit "B").
13. In order to secure such indebtedness, on October 3, 2007, Cox Investments Group made, executed and delivered to Plaintiff a Mortgage of Real Estate in writing covering real property in Horry County, South Carolina described as follows:

Unit 1408 of Margate Tower at Kingston Plantation Horizontal Property Regime, established pursuant to Master Deed for Margate Tower at Kingston Plantation Horizontal Property Regime, dated August 9, 2004 and recorded August 13, 2004 in Deed Book 2776 at Page 573, and all Exhibits and Amendments thereto (the "Master Deed"), records of Horry County, South Carolina.

SUBJECT to all of the provisions of the aforesaid Master Deed and all Exhibits and Amendments thereto.

AND SUBJECT to all other restrictions, reservations, easements and rights of way of record, including those as set on the recorded map.

TOGETHER With all of the appurtenances thereto according to said Master Deed, and Exhibits and Amendments thereto, and the Grantee assumes and agrees to observe and perform its obligations under the Master Deed, and all Exhibits and Amendments thereto, including, but not limited to, the payment of assessments for the maintenance and operation of the unit and condominium and subject to the provisions of the By-Laws of Margate Tower at Kingston Plantation Property Owners Association, Inc., and to the provisions of the Declaration of Covenants, Conditions, and Restrictions for Kingston Plantation and all exhibits and amendments thereto.

OCEANFRONT PROPERTY DISCLOSURE STATEMENT

Pursuant to S.C. Code Ann. Section 48-39-33 (1988 Supp.), the Grantor discloses to the Grantee that the property or a portion thereof is or may be subject to statutory regulation imposed by The South Carolina Coastal Act of 1977, to S.C. Code Ann. Section 48-39-10 et seq. (1988 Supp.), hereinafter collectively called "the Acts". The Acts involve, and may subject the property to, the creation and existence of interim and final baselines, setback lines, the velocity zone and an erosion rate, all as is

more fully defined in the Acts. Part or all of the property is or may be located seaward of the setback line, the minimum setback line or baseline, and has an erosion rate, all as determined by the South Carolina Office of Ocean and Coastal Resource Management ("OCRM"). The Acts may restrict the Grantee's right to build, repair or rebuild structures on the property. No structure may be constructed seaward of the setback line without a permit issued by the OCRM. Pursuant to the Acts, the locations of the baseline and setback lines on the property and the currently applicable erosion rate may be obtained from OCRM. The Grantor makes no representation to the Grantee concerning the location of such baselines, setback lines, or the velocity zone, the effect of such regulation on the property, or the accuracy of the foregoing disclosure.

TMS #: 166-06-41-354

Property Address: 8500 Margate Circle, Unit 1408, Myrtle Beach, SC 29572

The Mortgage described herein was recorded in the Office of the Register of Deeds for Horry County in Mortgage Book 4976 at Page 117, a copy being attached hereto and incorporated herein by reference as Exhibit "B".

14. The Mortgage contains a scrivener's error in that it inaccurately reflects that the "Borrower" is Cox Investments Group, LLC while the actual borrowers are Bobby E. Lucas, Darren K. Lucas and Jeffrey E. Cox. Cox Investment Group, LLC was the owner and holder of the real property described in the Mortgage at the time the Mortgage was executed and intended to give the Plaintiff a lien on the real property described as security for the Note described in this Complaint.
15. The identified scrivener's error was mutual among the parties.
16. Reformation of the Mortgage to correct this scrivener's error does not prejudice any party and would reflect the agreement among the parties.
17. The Plaintiff is entitled to an Order reforming the Mortgage to correct the

scrivener's error.

FOR A SECOND CAUSE OF ACTION
(Foreclosure of Mortgage)

18. The allegations of paragraphs 1 through 17 are alleged as if repeated verbatim.
19. This is an action for the foreclosure of a first mortgage on real estate and is not subject to the terms and provisions of the South Carolina Consumer Protection Code.
20. The Defendants have defaulted under the terms and conditions of the said Note by failing to make the payments as required under such Note and Plaintiff has elected to declare the entire balance immediately due and payable pursuant to the terms of such Note and Mortgage. That after all credits being given the maker of said Note, there remains past due and owing to the Plaintiff the sum of Eight Hundred Eighty-Four Thousand Four Hundred Ninety-Eight and 06/100 (\$884,498.06) Dollars as of April 30, 2009 plus per diem in the amount of One Hundred Nineteen and 44/100 (\$119.44) Dollars.
21. Because of the default in payment of said Note, the Plaintiff has been forced to place this claim with Scott B. Umstead, attorney at law, to bring suit thereon.
22. The Note further provided that, in the even of default and in the event it was necessary to place said Note for collection with attorneys, the Defendants agreed to pay all reasonable attorney's fees and costs in connection herewith.
23. The following is a junior lienholder whose interest are being foreclosed in this action:

- a. The Margate Tower at Kingston Plantation Property Owners' Association, Inc., by virtue of that certain Notice of Delinquent Assessments and Lien in Favor of The Margate Tower at Kingston Plantation Property Owners' Association, Inc. filed with the Horry County Register of Deeds on May 21, 2009 in Deed Book 171 at Page 938.
24. The Plaintiff is informed and believes it is entitled to an Order determining the amount due under the Note plus an award of collection expenses including reasonable attorney's fees and costs of this action. Plaintiff is entitled to an Order foreclosing the mortgage lien of the Plaintiff and ordering the public sale of the premises to satisfy the indebtedness due to the Plaintiff.

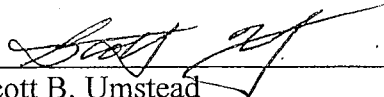
WHEREFORE, having fully set forth its Complaint, the Plaintiff prays that this Honorable Court inquire into the matters set forth herein and award the following relief:

- a. Reformation of the Mortgage to correct the identified scrivener' error.
- b. That the amount due and owing upon the Note and Mortgage dated October 3, 2007 held by the Plaintiff be ascertained and determined under the direction of the Court, together with collection expenses, attorney's fees and the costs of the action, together with any redemption price paid by the Plaintiff and that Plaintiff be granted judgment against Defendants, jointly and severally, for such amount;
- c. That Plaintiff's aforescribed Mortgage be declared a first lien and the Plaintiff have judgment of foreclosure for the amount so found to be due and owing thereon, together with any taxes or insurance premiums which may be due, with an award of collection expenses including attorney's fees and costs of this action

as well as the price of redemption if paid by the Plaintiff; and

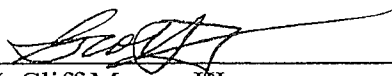
- d. That the mortgaged premises and the personal property found thereon be sold under the discretion of this court, the equity of redemption being barred, and that the proceeds be applied as follows.
 - i. First, to the cost and expense of the within action and sale;
 - ii. Second, to the payment and discharge of the amount due on Plaintiff's Note and Mortgage, together with attorney's fees and other sums as aforesaid;
 - iii. Third, the surplus, if any, be distributed pursuant to SCRCP Rule 71(c).
- e. That the Mortgager be reformed as set-forth in the Second Cause of Action.
- f. That a deficiency judgment be entered against the Defendants, jointly and severally, in such amount as the Court may deem appropriate, and;
- g. For such other and further relief as this Court deems just and proper.

SCOTT B. UMSTEAD, P.A.



Scott B. Umstead
4226 Mayfair Street, Suite 100
Myrtle Beach, SC 29577
Ph: 843-913-4610
Attorney for Plaintiff

ELLIS, LAWHORNE & SIMS, P.A.

for 

W. Cliff Moore, III
P.O. Box 2285
Columbia, SC 29205
(803) 212-4956
cmoore@ellislawhorne.com
Attorney for the Plaintiff.

May ___, 2010
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NO.: 2009-CP-26-5479

Fidelity Bank,

Plaintiff,

v.

Cox Investments Group, LLC, Jeffrey E.
Cox, Bobby E. Lucas, Darren K. Lucas, and
The Margate Tower at Kingston Plantation
Property Owners' Association, Inc.,

Defendants.

**ORDER PERMITTING PLAINTIFF
TO AMEND COMPLAINT**

FILED
HORRY COUNTY
10 APR 28 PM 2:16
JANIE HUGGINS-WARD
CLERK OF COURT

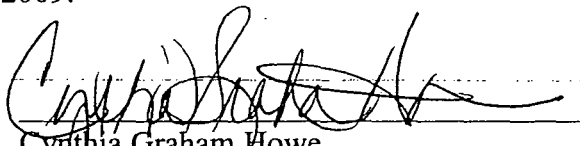
THIS MATTER comes before me on Motion of Scott B. Umstead of Scott B. Umstead, P.A., attorney for the Plaintiff, seeking to amend the Complaint in this action.

IT APPEARS that pursuant to South Carolina Rule of Civil Procedure 15(a), the Defendants in this action would not be prejudiced by the amendment of the Complaint and;

IT IS THEREFORE ORDERED that the Plaintiff be permitted to amend its Complaint in this action and shall serve the Amended Complaint on the Defendants upon the filing of this Order and the Defendants are permitted fifteen (15) days from the date of service to file their responsive pleadings.

IT IS SO ORDERED.

Dated this 23 day of April, 2010.
~~December, 2009.~~


Cynthia Graham Howe
Master-in-Equity for Horry County

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NO.: 2009-CP-26-5479

Fidelity Bank,

Plaintiff,

v.

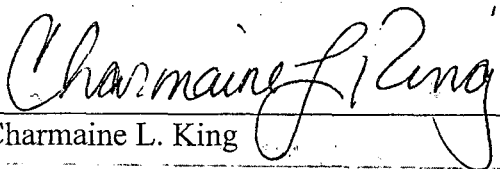
Cox Investments Group, LLC, Jeffrey E.
Cox, Bobby E. Lucas, Darren K. Lucas, and
The Margate Tower at Kingston Plantation
Property Owners' Association, Inc.,
Defendants.

CERTIFICATE OF MAILING

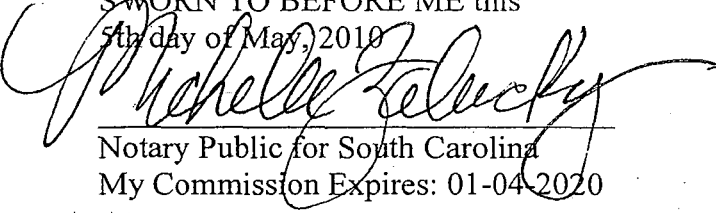
Charmaine L. King certifies she is an employee of the law firm of Scott B. Umstead, P.A., attorney for the Plaintiff, and that she has mailed the document(s) listed below in connection with the above-captioned action via U. S. First Class Mail to the addressee(s) below on May 5, 2010, and proper postage was attached thereto.

DOCUMENT(S): Order Permitting Plaintiff to Amend Complaint, Amended Summons and Amended Complaint

ADDRESSEE(S): William I. Diggs
1700 Oak Street, Suite D
Myrtle Beach, SC 29577


Charmaine L. King

SWORN TO BEFORE ME this
5th day of May, 2010


Notary Public for South Carolina
My Commission Expires: 01-04-2020

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-26-5479

Fidelity Bank,)
)
Plaintiff,)

v.)

Cox Investments Group, LLC,)
Jeffrey E. Cox, Bobby E. Lucas,)
Darren K. Lucas, and The)
Margate Tower at Kingston)
Plantation Property Owners')
Association, Inc.)
Defendants.)

**ANSWER TO
AMENDED COMPLAINT**

FILED
COUNTY
2010 MAY 11 AM 10:46
KELANIE HUGGINS-WARD
CLERK OF COURT

COME NOW THE DEFENDANTS, Cox Investments Group, LLC, Jeffrey E. Cox, Bobby E. Lucas, and Darren K. Lucas, who would, responding to the Plaintiff's complaint, show unto this Court as follows:

FOR A FIRST DEFENSE

Plaintiff's complaint fails to state facts sufficient to constitute a cause of action and pursuant to S.C.R.C.P. 12(b)(6) defendants plead such failure as their first defense.

FOR A SECOND DEFENSE
(Failure of Consideration)

The mortgage fails as being without consideration and is therefore void and unenforceable.

FOR A THIRD DEFENSE
(Lack of Agreement to Note Modification)

The mortgagor did not agree to any note modification agreement and mortgagor's position has been prejudiced by plaintiff's actions. Accordingly, the mortgage is unenforceable.

FOR A FOURTH DEFENSE

(Laches)

The mortgagor pleads laches as a defense to the foreclosure coupled with prejudice to the mortgagor.

FOR A FIFTH DEFENSE

(Failure of Corporate Resolutions)

The corporate resolutions do not require the mortgagor to ratify personal actions taken by any member(s) for the benefit of such member(s) personally and the mortgagor chooses not to do so.

FOR A SIXTH DEFENSE

(Prejudice)

Reforming the mortgage would prejudice the defendants and defendants jointly and severally affirmatively plead prejudice as a defense to reformation of the mortgage.

FOR A SEVENTH DEFENSE

(Lack of Mutual Mistake of the Parties)

There was no mutual mistake of the parties and defendants would affirmatively plead lack of mutual mistake of the parties as a defense to reformation of the mortgage.

FOR AN EIGHTH DEFENSE

(Adoption of alleged Scrivener's Error)

Plaintiff executed and accepted the mortgage document after it had been prepared thereby nullifying any right to assert a theory of mortgage reformation and defendants would affirmatively plead the same as a defense to this action.

FOR A NINTH DEFENSE

(Lack of Scrivener's Error)

The named defendants did not sign the mortgage and thus there could be no "scrivener's error." Defendants affirmatively absence of scrivener's error as a defense to

this action

FOR A TENTH DEFENSE

(Denial)

1. Admit.

2. Admit

3. Denied.

4. Denied

5. Denied

6. Admit

7. Admit

8. Defendants would acknowledge that neither Fannie Mae nor Freddie Mac have an interest in this property

9. Admit

10. Admit

11. Admit

12. Admit

13. Denied.

14. Denied. The named defendants did not sign the mortgage and thus there could be no "scrivener's error."

15. Denied. Further, Defendants would show that the plaintiff signed the mortgage document after it had been prepared thereby nullifying any right to rely on a theory of mortgage reformation based on scrivener's error due to mutual mistake.

16. Denied.

17. Denied

FOR A FIRST DEFENSE TO THE
SECOND CAUSE OF ACTION

18. The allegations of paragraphs 1 – 17 are re-alleged as if repeated herein verbatim.

19. Denied.

20. Denied.

21. Denied

22. Defendants would show that the note speaks for itself and is what it is

23. Denied

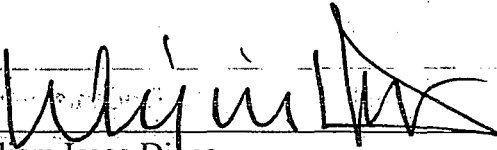
24. Denied

WHEREFORE, having fully responded to the plaintiff's complaint, the defendants would request the following relief:

- a. the plaintiff's complaint be dismissed in its entirety;
- b. defendants be awarded attorneys fees pursuant to the note proffered by the plaintiff in this action; and
- c. any other and further relief deemed just and proper by this Court.

Respectfully submitted,

LAW OFFICES OF WILLIAM ISAAC DIGGS


William Isaac Diggs
1700 Oak Street, Suite D
Myrtle Beach, SC 25977
843-626-4243

**ATTORNEYS FOR THE DEFENDANTS COX
INVESTMENT GROUP, LLC, JEFFREY E.
LUCAS, AND BOBBY E. LUCAS**

This 11th day of May, 2010
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CURCUIT
CASE NO.: 2009-CP-26-5479

Fidelity Bank,)

Plaintiff,)

v.)

Cox Investments Group, LLC,)

Jeffrey E. Cox, Bobby E. Lucas,)

Darren K. Lucas, and The Margate)

Tower at Kingsston Plantation)

Property Owners' Association, Inc.)

Defendants.)

**MEMORANDUM IN SUPPORT OF
JUDGMENT FOR DEFENDANTS**

11 JUN 27 PM 1:34
CLERK OF COURT

COME NOW THE DEFENDANTS, Cox Investments Group, LLC, Jeffrey E. Cox, Bobby E. Lucas, and Darren K. Lucas, who would submit the following Memorandum in Support of Judgment for Defendants. This is an action to reform a mortgage and foreclose. Plaintiff also seeks a deficiency judgment in the event a sale of the mortgaged property fails to fully satisfy the debt obligation alleged to exist.

Historical Background and Timeline

On September 26, 2007, a "Certificate of Managers of Limited Liability Company" was executed purportedly allowing Cox Investment Group, LLC to borrow money from time to time from plaintiff, ratifying documents *previously executed* relating to such transactions, and allowing the bank to rely upon the resolution until further notice. The certificate was signed by Jeffrey E. Cox and Brooke E. Cox in their individual capacities.

October 3, 2007 a note (number 0000372755) was executed by Bobby E. Lucas; Darren K. Lucas and Jeffrey E. Cox in favor of the plaintiff in the amount of

\$860,000.00.¹ The maturity of this note was April 3, 2008, or just a six month term. The evidence at trial showed that this money was not used to purchase the property which was mortgaged in Myrtle Beach by Cox Investment Group, LLC, but was apparently used to pay off another financial obligation. There was no mortgage on the subject property at that time. A corporate resolution dated October 3, 2007, not drafted by the corporate defendant or either of its members, was adopted which stated

Resolved, that the said Corporation be and it is hereby authorized and directed to refinance of [sic] Unit 1408 of Margate Towers@ Kingston Plantation, and that Jeff Cox as Managing Member of said Corporation, has the power to sign, been [sic] shall be empowered to sign all documents relating to said purchase.

This resolution was signed by Jeffrey E. Cox, Managing Member.

A mortgage was executed this date naming Cox Investments [sic] Group, Inc.² as the borrower. This mortgage was signed by Jeffrey E. Cox Managing Member and witnessed by a North Carolina Notary. On April 9th, 2008, a Note Modification Agreement was executed which extended the maturity date of the note to October 9, 2008. The three individual defendants executed this agreement but the corporate defendant did not. On October 9th, 2008, a second Note Modification Agreement was executed by the individual defendants. The maturity date was extended to April 9th, 2009. The corporate defendant did not sign the agreement.

Notwithstanding this course of dealing which had been established between the parties, the plaintiff refused to accept any more note modification agreements even

¹ This was loan number 0000372755 as shown on the face of the exhibit note introduced at trial by plaintiff's counsel.

² This is not the correct name of the corporate defendant. The correct name of the corporate defendant is "Cox Investment Group, LLC," not Cox *Investments* Group.

though the defendants were ready, willing and able to continue to pay required interest payments and had asked for permission to do so. The plaintiff offered no reason at trial as to why it made the decision it did in this case. In fact, at trial plaintiff chose to present a single bank employee who knew only what he had read from documents in the bank's file. On June 2, 2009, the original civil action was filed. This complaint sought only to foreclose on the mortgage and in the prayer plaintiff requested a deficiency judgment against the defendants. An answer was filed on July 6, 2009, by Cox Investment Group, LLC; Jeffrey E. Cox; and Bobby E. Lucas. After service had been accomplished on the third individual defendant, Darren K. Lucas, he filed an answer on August 27, 2009. This filing contained 5 defenses and tracked the answer previously filed by the other defendants.³

On October 7, 2009, an Order of Reference was filed following a motion there for along with a request to amend the complaint. It was Plaintiff's original counsel who sought to amend the complaint. This motion was granted. On December 22, 2009, an Answer to the Amended Complaint containing 5 defenses was filed by Cox Investment Group, LLC; Jeffrey E. Cox; Bobby E. Lucas; and Darren K. Lucas, even though the amended complaint had not actually been filed and served.⁴

³ The answer's first defense contained admissions and denials; it then asserted a failure of consideration; lack of agreement as to the note modification; laches and a failure of corporate resolutions.

⁴ Plaintiff's counsel had attached a copy of the proposed amended complaint to the motion for reference and the motion to amend the complaint. It is to that filing which defendants filed a responsive pleading prior to actual service of the court authorized amended complaint. This Court's file shows that the Order permitting amendment of the complaint was filed on April 28, 2010.

On January 21, 2010, a Notice of Appearance as co-counsel for Plaintiff was mailed to the Court and all parties. Co-counsel's appearance indicated that he was to work with plaintiff's original counsel of record. Thereafter, on May 4, 2010, the Amended Summons and Complaint were filed by original counsel and co-counsel and served. The body of this filing contained two causes of action. It sought reformation of the mortgage and foreclosure of the mortgage. The *prayer* asked for a deficiency judgment as there was still no cause of action on the note itself or for a money judgment. The cause of action which seeks to reform the mortgage does reference the note but does so in an effort to explain and justify the mortgage reformation. It actually alleges a scrivener's error.

The second cause of action then alleges a default under the terms of the note and *seeks foreclosure* of the mortgage. On May 11, 2010, after actually being served with the amended summons and complaint, an answer to the Amended Complaint was filed by defendants Cox Investment Group, LLC; Jeffrey E. Cox; Bobby E. Lucas; and Darren K. Lucas. This responsive pleading contained 10 defenses.⁵ Thereafter, on April 6, 2011, an order was filed which relieved plaintiff's original counsel and substituted counsel who appeared at the trial of this matter along with previously noticed co-counsel.

I. Sufficiency of Pleading and Deficiency Judgment

a. Defendants initially asserted that Plaintiff's complaint failed to state facts sufficient to constitute a cause of action pursuant to S.C.R.C.P. 12(b)(6). Under Rule 12(b)(6), SCRCPP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. In considering such a motion, the trial

⁵ Some of those defenses are abandoned herein as discussed below.

court must base its ruling solely on allegations set forth in the complaint. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then to grant a motion to dismiss for failure to state a claim is improper. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006). An action to recover on a promissory note is an action at law. *Wayne Dalton Corp. v. Acme Doors, Inc.*, 302 S.C. 93, 95, 394 S.E.2d 5, 6 (Ct.App. 1990); *Chambers v. Pingree*, 351 S.C. 442, 570 S.E.2d 528 (Ct.App. 2002).

An action to foreclose a real estate mortgage comes within the equitable jurisdiction of the court. *MI Co., Ltd. v. McLean*, 325 S.C. 616, 482 S.E.2d 597, 601 (Ct.App. 1997). However, under Rule 38 (a), SCRCP, issues of fact in an action for money only must be tried by a jury unless a jury trial is waived. In determining whether the case is legal or equitable, some South Carolina cases have applied the "main purpose rule." If a plaintiff has prayed for money damages in addition to equitable relief, characterization of the action as equitable or legal depends on the plaintiff's "main purpose" in bringing the action. *Baughman v. AT&T*, 289 S.C. 127 [298 S.C. 127], 129, 378 S.E.2d 599, 600 (1989). However, numerous cases have held that where legal and equitable issues and rights are asserted in the same complaint, legal issues are for determination by a jury and equitable issues for the judge. *Airfare, Inc. v. Greenville Airport Comm.*, 249 S.C. 265, 269, 153 S.E.2d 846, 848 (1967); *Winter v. U.S. Fidelity & Guaranty Co.*, 240 S.C. 561, 573, 126 S.E.2d 724, 730 (1962).⁶

⁶ Counsel did not write this paragraph. This paragraph is a quote *in toto* from the Court's opinion in *Mortg. Recovery v. Heritage Clipper Riv.*, 327 S.C. 491, 493. 489 S.E.2d 655 (Ct.App. 1997).

In plaintiff's case, plaintiff has *two* main purposes before he even gets to the legal issue. He seeks (1) to reform the mortgage, and then, (2) to foreclose it. While S.C. Code Ann § 29-3-660 allows a court to render a deficiency judgment against *third parties* who are deemed to be obligors with regard to the mortgaged property, that statute is silent regarding actions to reform a mortgage.⁷ Here, Plaintiff has jumbled its causes of action or at minimum co-mingled them. Plaintiff has failed to allege that the individual defendants are persons who secured the *mortgage debt* with a prior covenant or obligation as contemplated by the statute. We submit that in a mortgage reformation action a plaintiff cannot simultaneously seek a deficiency judgment and a reforming of the mortgage in order to establish a covenant by third parties regarding the mortgaged property. The statute does not allow for such a bootstrapping as is attempted here. Plaintiff seeks to reform the mortgage by substituting obligors and pleading for deficiency against them *without setting forth any cause of action to establish the legal debt*. Under plaintiff's pleading it would be impossible to separate out the legal issues from the equitable one, as there are none.

This statute (S.C. Code Ann § 29-3-660) does not relieve any party from the rules governing the pleading of actions, nor does it otherwise permit a party to fail to plead elements of a cause of action. Once a mortgage is reformed the statute does not allow the mortgage to be made retroactive so as subject *third parties* to a deficiency judgment

⁷ In pertinent part here, this statute provides, "...[A]nd if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases."

absent a specific pleading brought in an “at law” action having been properly pled.⁸

The *prayer* asks that the “Mortgager [sic] be reformed as set-forth in the Second Cause of Action.” This request is wholly inconsistent with the body of the pleading’s second cause of action which *sought foreclosure*, not reform. Thereafter, plaintiff prays that, “a deficiency judgment be entered against the Defendants, jointly and severally, in such amount as the Court may deem appropriate.” Again, there is no “at law” pleading independent of the foreclosure portion of the complaint. Such has to be established before the mortgage may be foreclosed and deficiency entered, we submit. S.C. Code Ann § 29-3-660 is a deficiency judgment statute. It is not a mortgage reformation statute. Plaintiff’s pleading and prayer for relief do not establish that the individual defendants entered into a covenant with respect to the mortgaged property and are therefore legally subject to joint and several liability in a deficiency judgment setting. The statute allows for an equitable pleading and a deficiency, not two equitable pleadings and a deficiency. Thus, the general rule acknowledged in *Bartles v. Livingston*, 282 S.C. 448, 319 S.E.2d 707 (Ct.App. 1984) is not applicable in this case for two reasons.⁹ First, that case did not involve a reformation of a mortgage so as to rename the borrowers; and secondly, unlike the instant case, the mortgagor(s) were the individuals that granted the mortgage.

⁸ This is important because defenses could have been raised to an “at law” cause of action on the note. One such example is an established course of dealing on the short term notes used by plaintiff. Such a course of dealing has an effect of lulling one into a false sense of security making one not realize the importance of seeking alternative financing or creative selling strategies for the property or other such defenses such as: waiver, estoppel, unclean hands or intervening circumstances or even the assertion of a new agreement if the facts warrant.

⁹ The rule is as follows: “Absent grounds to set aside the decree of foreclosure, there is no discretion to cut off the right to a deficiency after sale where (1) the complaint in the foreclosure action asks for personal judgment, (2) the amount of the debt is fixed in the foreclosure decree, and (3) the sale is insufficient to satisfy the entire debt. 282 S.C. at 461.

b A deficiency judgment under S.C. Code Ann § 29-3-660 at minimum requires the presence of an enforceable mortgage. For the reasons discussed below, plaintiff does not have such a mortgage in this action. The mortgage had expired and therefore, plaintiff cannot rely on the stated statute. A fortiori, the pleading is defective in this action as no relief has been sought relative to a money judgment against the defendants.

II Mistake / Scrivener's Error

While the plaintiff did not specifically plead a mutual mistake, defendants asserted that a mutual mistake was not made in this instance as a defense. A written instrument may be reformed on the basis of mistake only when the mistake is a mutual mistake of the parties. *Commercial Union Assurance Company v. Castile*, 283 S.C. 1, 4, 320 S.E.2d 488, 490 (Ct.App. 1984); *Southern Realty & Const. Co. v. Bryan*, 290 S.C. 302, 350 S.E.2d 194 (Ct.App. 1986). While plaintiff did elicit testimony at trial as to a mistake from defendant Jeffrey E. Cox, we submit the plaintiff has not pled that a mistake occurred in this case, mutual or not, and it has not established one. Rather, plaintiff alleged that a "scrivener's error" occurred and that it was the "scrivener's error" that was "mutual among the parties." (See Complaint at page 4, ¶ 15). The parties were not scriveners in this matter, thus, a scrivener's error could not be mutual. Moreover, the testimony at trial established that from the time the mortgage was given until the time of the foreclosure action, a total of twenty-one months, no one took any action to correct the alleged scrivener's error, even though two modification agreements were entered into by and between the parties, and a third had been refused. If it had been a scrivener's error, a

million dollar stake should have been noticed immediately, we submit. It was only when it was convenient for the plaintiff that errors began to spring from the mortgage.

Plaintiff adopted the scrivener's error. Plaintiff executed and accepted the mortgage document after it had been prepared thereby nullifying any right to assert a theory of mortgage reformation and defendants have affirmatively pled the same as a defense to this action. Plaintiff prepared every document used in this litigation. As discussed below, nothing matches up.

III. Corporate Resolutions

Plaintiff's corporate resolutions need to be reformed yet plaintiff has not sought such relief in this action. Under the plaintiff's theory, the mortgage was given as security for the note executed on October 3, 2007, by the three individual defendants. Loan note number 0000372755 between Bobby E. Lucas; Darren K. Lucas and Jeffrey E. Cox in the amount of \$860,000.00 had a maturity date of April 3, 2008. The mortgage *does not* state that it will secure extensions of the note's term, or any loan modification agreement extending the maturity date of the loan. *Thus, the mortgage did not secure the property after the original note's maturity date of April 3, 2008.* While the mortgage did secure future advances,¹⁰ there is no evidence of any such advance in this case so we may assume there were none. Even if there were, they would not have been secured beyond the date of April 3, 2008. Defendant has been prejudiced by the note modifications. The real estate market has crashed and to construe the mortgage as plaintiff requests would work a hardship on defendant in that regard.

¹⁰ Paragraph 24 deals with future advances. It states, "The lien of this Security Instrument shall secure the existing indebtedness under the note and any future advances made under the Security Instrument up to one hundred fifty percent (150%)

Moreover, while the note modification agreements provide that the collateral shall secure the extension, Jeffrey E. Cox signed the agreement in his *individual capacity*. He never intended that the signature be a “representative” of the corporation,¹¹ and there was no evidence presented at trial that the bank asked the LLC to execute the note. The corporation has raised this as a defense in this litigation. (See Defendant’s Third Defense). Jeffrey Cox did not have the authority to extend the note term in his individual capacity without an intention to do so in response to a bank request. Indeed, the Corporate Resolution introduced by plaintiff states that, “Jeff Cox as Managing Member of said Corporation, has the power to sign, been [sic] shall be empowered to sign all documents relating to said purchase.” Because Jeff Cox did not sign, and never was asked to sign, the note in his corporate capacity, and never represented to the lender that he was doing so, thereby neither obligating the corporation on the note, nor agreeing on behalf of the corporation to any extensions of maturity, the effectiveness of plaintiff’s mortgage expired on April 3, 2008.

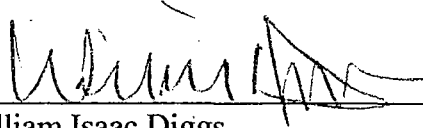
CONCLUSION

¹¹ See S. C. Code Ann. § 36-3-402. **Signature by representative.** This statute reads in part, “(a) If a person acting, or *purporting to act, as a representative* signs an instrument by signing either the name of the represented person or the name of the signer, the represented person is bound by the signature to the same extent the represented person would be bound if the signature were on a simple contract.” Emphasis added. Jeffrey E. Cox never purported to act in a representative capacity at any time while executing the note at issue in this case. This statute is identical to the North Carolina statute which would control this transaction. See § 25-3-402. *Signature by representative* subsection “a”.

Thus, defendants rely on the First, Third, Fourth, Fifth, Sixth, Seventh and Ninth Defenses set out in the Answer to Amended Complaint to justify dismissal of plaintiff's action and the issuance of an order from this Court awarding plaintiff nothing.

Respectfully submitted,

LAW OFFICES OF WILLIAM ISAAC DIGGS



William Isaac Diggs
1700 Oak Street, Suite D
Myrtle Beach, SC 25977
843-626-4243

**ATTORNEYS FOR THE DEFENDANTS COX
INVESTMENT GROUP, LLC, JEFFREY E.
LUCAS, AND BOBBY E. LUCAS**

This 27th day of June, 2010
Myrtle Beach, South Carolina

SECRET

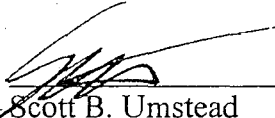
Defendants.

CONSENT ORDER OF REFERENCE

FILED
HIGBRY COUNTY
009 OCT -7 PM 3:28
MELANIE HUGGINS
CLERK OF COURT

Hearing Scheduled for 11/4/09 @ 3:30pm

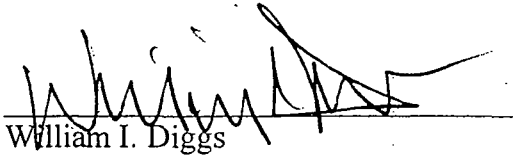
I CONSENT:



Scott B. Umstead
SCOTT B. UMSTEAD, P.A.
4226 Mayfair Street, Suite 100
Myrtle Beach, South Carolina 29577
Phone: (843) 913-4610
Attorney for the Plaintiff

Fidelity Bank, v. Cox Investment Group, LLC, Jeffrey E. Cox, Bobby E. Lucas, Darren K. Lucas, and The Margate Tower at
Kingston Plantation Property Owners' Association, Inc.,
Civil Action No. 2009-CP-34-39
Consent Order of Reference

I CONSENT:

A handwritten signature in black ink, appearing to read 'William I. Diggs', is written over a horizontal line.

William I. Diggs
Law Office of William Isaac Diggs
1700 Oak Street, Suite D
Myrtle Beach, SC 29577
Attorney for Defendants,
Cox Investments Group, LLC, Jeffrey E.
Cox and Bobby E. Lucas

(116)

CERTIFICATE OF MANAGERS OF LIMITED LIABILITY COMPANY

The undersigned hereby jointly and severally certify that:

(1) The undersigned are all of the managers or if applicable, member-managers of
Cox Investment Group, L.L.C.
(the "Company"), which is a limited liability company organized under the laws of the State of North Carolina.

(2) The documents attached hereto constitute (i) the entire and complete Operating Agreement, as defined in North Carolina General Statutes § 57C-1-03(16) with respect to the Company and (ii) the most recently filed Annual Report for the Company filed pursuant to North Carolina General Statutes § 57C-2-23. Such Operating Agreement is currently in full force and effect and binding upon all members of the Company. Such Operating Agreement and Annual Report have not been amended. There are no other understandings, contracts or agreements, whether written or oral, relating to the management of the affairs of the Company, the conduct of the Company's business or the authority of the Company's managers to act on behalf of the Company.

(3) The Company has validly taken the action described below. Such action (i) has received all requisite authorizations of the Company's members, managers, or otherwise, (i) has not been rescinded, amended, or modified, and (iii) is valid and binding on the Company:

RESOLVED, that it is in the best interest of the Company to borrow money from time to time from FIDELITY BANK

(the "Bank"), (all such loan(s) being hereinafter referred to collectively as the "Loans") which Loans may bear interest and may be secured by any or all of the Company's assets, including, but not limited to, its real property; and FURTHER RESOLVED, that any One of the following persons:

Jeffrey E. Cox; Member

Brooke E. Cox; Member

is hereby authorized, directed and empowered in the name and on behalf of the Company, to (i) take all actions necessary or requested by the Bank in connection with the Loans and (ii) execute, perform and to deliver to the Bank all documents, notes, deeds of trust, loan agreements, guaranties, security agreements, Uniform Commercial Code financing statements, indemnities, contracts, applications, assignments, certificates, and any other instruments which may be requested by the Bank in connection with the Loans, on such terms and in such form as may be requested by the Bank and as may be deemed appropriate and advisable by such person or persons, their execution thereof to be conclusive evidence of such appropriateness and advisability.

FURTHER RESOLVED, that all documents and acts in connection with the Loans heretofore executed, performed and delivered for or on behalf of the Company by any of the persons named above are hereby ratified, adopted and confirmed.

FURTHER RESOLVED, that the Bank shall be entitled to rely upon the foregoing resolutions and upon the authority of the persons named above until written notice to the contrary is actually received by the Bank from a duly authorized manager of the company.

Jeffrey E. Cox
Brooke E. Cox

Dated 9/26/07

FINANCIAL COMPUTING, INC. LLC (11/97)



CORPORATE RESOLUTION

OF

Cox Investment Group, LLC

I, Jeff Cox, do hereby certify that I am Managing Member of Cox Investment Group, LLC, having its place of business in South Carolina, and as such as the keeper of the minutes of the proceedings of the Board of Directors of said Corporation which was duly called and held in accordance with the Law and the By-Laws of the Corporation as which meeting a quorum of the Directors was present; and that the following is a true and correct copy of the Resolution duly adopted as said meeting as the same appear on the minutes of the meeting of the directors of said Corporation, to wit:

RESOLVED, that the said Corporation be and it is hereby authorized and directed to refinance of Unit 1408 of Margate Towers@ Kingston Plantation, and that Jeff Cox as Managing Member of said Corporation, has the power to sign, been shall be empowered to sign all documents relating to said purchase.

This 3rd day of October, 2007.

Cox Investments Group, LLC

By

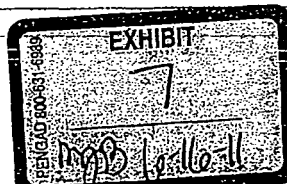
Jeffrey E. Cox, Managing Member

Approved:

Cox Investments Group, LLC

By

Jeffrey E. Cox, Managing Member



NOTE MODIFICATION AGREEMENT

Check one: ☐ PAD Loan ☒ AFS Loan ☐ Letter of Credit ☐ Checking Reserve

April 9, 2008
Date of this Agreement
860,000.00
Loan/Line Amount
860,000.00
Current Balance
Future/Current Obligation #

The "Note" is that note dated October 3, 2007 in the original principal sum of \$ 860,000.00 that evidences the loan identified above. The parties to this Note Modification Agreement (this "Agreement") are (i) The Fidelity Bank ("Lender"), and (ii) the undersigned parties, each of whom is obligated either as an original maker of the Note or as one who has assumed the obligations of an original maker (collectively, "Maker", whether one or more), or as a surety, guarantor, or endorser of the Note. Lender is the owner and holder of the Note. Maker has requested and Lender has agreed for the Note and other Loan Documents to be modified, subject to the terms and provisions of this Agreement. NOW, THEREFORE, for and in consideration of the premises, the parties to this Agreement agree that the terms of the Note and the other Loan Documents are modified, amended, renewed, extended and supplemented as of the date of this Agreement (unless otherwise specified) to effect the following changes to the loan transaction: (Complete Sections 1 and 2 entitled "Interest Rate" and "Payment Terms" in all cases. Subsections not completed are deleted. Sections 3, 4, and 5 apply only if completed.)

1. INTEREST RATE. Interest shall be calculated on an "Actual/360" daily simple interest basis unless the loan evidenced by the Note is subject to the federal Truth-In-Lending Act and its implementing regulations or the following box is checked ☐, in which case interest will be calculated on an "Actual/365" daily simple interest basis. Unless the default rate described in Section 7 below applies, interest shall accrue on the outstanding principal balance: (Complete Section A or B or Check C.)

(A) At the simple, fixed interest rate of _____ percent per annum.

(B) At the variable interest rate of 0.000 percentage points above (☐ or below, if checked) the Prime Rate established from time to time by The Fidelity Bank (the "Index Rate"). However, the interest rate will not at any time exceed the maximum rate of _____ percent per annum (or the maximum rate permitted by applicable law, whichever is less), or fall below the minimum rate of _____ percent per annum. The interest rate as of the date of this Agreement stated in simple interest terms is 5.25 percent per annum. The interest rate is subject to change on a daily basis with changes becoming effective on the calendar day of the Index Rate changes unless the following box is checked ☐, in which case the interest rate is subject to change on a monthly basis with changes becoming effective on the first day of each calendar month based on the Index Rate in effect on the last day of the preceding calendar month.

(C) ☐ See Exhibit A attached hereto and incorporated herein by reference for interest rate provisions.

2. PAYMENT TERMS. (Complete Section A or B or C or D or E or check F.)

(A) Single Payment Loan - Principal and Interest Due at Maturity. The outstanding principal balance and all accrued interest (and credit insurance premiums, if applicable) shall be payable in one single payment on October 9th, 2008 (hereafter referred to as "Maturity").

(B) Single Payment Loan - Interest Due Monthly, Principal Due at Maturity. Interest shall be payable _____ (monthly, quarterly, semi-annual, etc.) beginning _____ and consecutively on the same day of each such calendar period thereafter, with any accrued but unpaid interest and unpaid principal (and credit insurance premiums, if applicable) due in full on _____ (hereafter referred to as "Maturity").

(C) Balloon Payments. The outstanding principal balance and accrued interest (and credit insurance premiums, if applicable) shall be payable in _____ equal consecutive _____ (monthly, quarterly, semi-annual, etc.) payments of \$ _____ each commencing on _____ (the "Regular Payment Commencement Date") and on the same day of each such calendar period thereafter and one final payment of \$ _____ due on _____ (hereafter referred to as "Maturity"), unless sooner paid. The periodic payment amount specified includes principal and interest (and credit insurance premiums, if applicable).

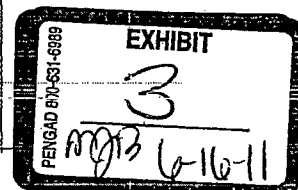
(D) Principal Plus Interest Payments. Principal payments shall be payable in _____ equal consecutive _____ (monthly, quarterly, semi-annual, etc.) payments of \$ _____ each commencing on _____ and on the same day of each such calendar period thereafter. In addition, _____ (monthly, quarterly, semi-annual, etc.) interest payments will be made on the same day of each such calendar period. One final payment of the entire balance (principal and interest) shall be due on _____ (hereafter referred to "Maturity").

(E) Installment Payments. The outstanding principal balance and accrued interest (and credit insurance premiums, if applicable) shall be payable in _____ equal consecutive _____ (monthly, quarterly, semi-annual, etc.) payments of \$ _____ each commencing on _____ (the "Regular Payment Commencement Date") and on the same day of each such calendar period thereafter and one final payment of same amount due on _____ (hereafter referred to as "Maturity"), unless sooner paid. The periodic payment amount specified includes principal and interest (and credit insurance premiums, if applicable).

(F) Other. ☐ See Exhibit A attached hereto and incorporated herein by reference for payment terms.

3. FEES. Loan fees and/or discount points in the aggregate amount of \$ _____ are due and payable to Lender upon the signing of this Agreement.

4. ADDITIONAL COLLATERAL. All collateral securing the Note shall remain as collateral for the Note unless and until expressly released by Lender. The following ADDITIONAL collateral and/or instruments is/are being given to secure repayment of the Note:



5. OTHER MODIFICATIONS:

6. **INTEREST AFTER DEFAULT.** After an event of default occurs (including failure to pay at Maturity), Lender may, at its option and without notice to any obligor (except for any notice required by applicable law), increase the interest rate on the Note one or more times to a rate or rates (each a "default rate") to be determined by Lender in its sole discretion. However, (a) the default rate shall never exceed the lesser of 15% per annum or the maximum interest rate permitted by applicable law, and (b) Lender will not increase the interest rate to a default rate if doing so is prohibited by applicable law or if this loan is subject to the federal Truth-In-Lending Act and its implementing regulations. If the default is subsequently cured, Lender may, at its option and without notice to any obligor, reduce the interest rate on the Note to the rate that would then have applied had no event of default occurred. To the extent permitted by applicable law, the interest rate provided for herein (including any default rate then in effect) or the legal rate of interest on judgments, whichever is greater, shall apply to any indebtedness due following the entry of a judgment relating to the collection of this loan.

7. **PRIME RATE.** Lender's "Prime Rate" of interest, as that term is used in this Agreement, means that rate established from time to time by Lender and identified as such within Lender's offices. The term "Prime Rate" is used as a means of identifying a rate of interest index and is not a representation by Lender that the Prime Rate is necessarily the lowest or most favorable rate of interest offered by Lender to borrowers generally, and no one shall have any claim or right of action based on such premise.

8. **VARIABLE RATE/NEGATIVE AMORTIZATION.** If the interest rate increases during the term of the Note and/or any fixed payment amount required to be paid by the terms of the Note is at any time insufficient to pay the periodic accruals of interest (and credit insurance premiums, if applicable), Lender may (a) increase the amount of the periodic payments to have the loan fully amortized at Maturity, (b) increase the amount of the periodic payments as necessary to pay all accruals of interest (and credit insurance premiums, if applicable) for the current period and from previous periods to avoid negative amortization and/or minimize the impact of negative amortization, (c) extend the Maturity and require additional supplemental periodic payments, (d) require the resulting increase to be paid at Maturity, or (e) select or designate any combination of the foregoing, all in Lender's discretion as determined from time to time by Lender. However, if this loan is subject to the federal Truth-In-Lending Act and its implementing regulations, the provisions of this section shall not be enforced in conflict with disclosures given pursuant thereto.

9. **INTEREST CALCULATION METHOD.** Interest that is calculated on an "Actual/360" daily simple interest basis is determined by applying the ratio of the annual interest rate over a year of 360 days, multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding. Interest that is calculated on an "Actual/365" daily simple interest basis is determined by applying the ratio of the annual interest rate over a year of 365 days, multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding.

10. **MISCELLANEOUS.** The term "Note" refers to the original Note identified on the front of this Agreement. The term "Loan Documents" includes all documents signed and delivered in connection with the loan transaction evidenced by the Note (including the Note, each security instrument, any loan commitment letters, any loan agreements and all loan application documents), whether now existing or hereafter arising. The terms "Note" and "Loan Documents" include all amendments, modifications, extensions, renewals and increases thereof. All of the Loan Documents are hereby modified, amended, renewed, extended and supplemented to the extent necessary to effect the changes to the loan transaction specified in this Agreement. The Note, as modified by this Agreement, shall be the joint and several obligation of each maker, regardless of whether such maker was an original maker of the Note. This Agreement shall be binding upon, and inure to the benefit of, the parties to this Agreement and their respective successors-in-interest. This Agreement is not a negation; rather, it constitutes a modification to the terms of an existing contractual relationship between the parties and is not intended as a cancellation of the original debt or the creation of a new debt. The terms and provisions of the Note and other Loan Documents not expressly modified by this Agreement (including, for example, any provision for late charges) shall continue in full force and effect. The terms of the Note and Loan Documents, as modified by this Agreement, are in all respects ratified and confirmed and shall continue in full force and effect.

IN WITNESS WHEREOF, each of the undersigned has hereunto set his or her hand and seal or caused this Agreement to be signed and sealed in its name by a person or persons duly authorized, all as of the date of this Agreement.

BUSINESS ENTITY:

(SEAL)

Name of Business Entity

By: _____ (SEAL)

Title: _____ (SEAL)

By/Attest: _____ (SEAL)

Title: _____ (SEAL)

Accepted: The Fidelity Bank

By: _____

Sales Associate No. _____ Cost Ctr. _____

INDIVIDUAL(S):

(SEAL)

Type Name: Bobby Lucas

(SEAL)

Type Name: Darren Lucas

(SEAL)

Type Name: Jeffrey C. Cox

(SEAL)

Type Name: _____

☐ See Signature Addendum for signature(s) of additional party(ies).

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Fidelity Bank,

Plaintiff,

v.

Cox Investments Group, LLC, Jeffrey
E. Cox, Bobby E. Lucas, Darren K.
Lucas, and The Margate Tower at
Kingston Plantation Property
Owners' Association, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

C.A. NO. 2009-CP-26-5479

**PLAINTIFF'S MEMORANDUM IN
RESPONSE TO DEFENDANTS'
POST TRIAL MEMORANDUM**

This matter was before the Court on June 16, 2011 for trial. Following the trial of the matter, counsel for the Defendants requested permission of the Court to file a post trial memorandum with the Court. That memorandum has been filed and this is in response to the arguments set forth by the Defendants in that memorandum.

The Defendants seem to make four Arguments in their post trial memorandum to the Court:

1. It is not possible to reform a mortgage and have that reformation subject third parties to a deficiency judgment under S.C. Code Ann §29-3-660.
2. An action for reformation of the mortgage was not sufficiently pled.
3. An action for a judgment on the Note was not sufficiently pled.
4. The mortgage does not secure the loan extensions and modifications.

For the reasons stated, the Defendants should not succeed on any of these arguments and the relief requested by the Plaintiff should be granted.

1. The Plaintiff has appropriately set out separate causes of action for the reformation of a mortgage and for the foreclosure of the reformed mortgage.

It appears that the Defendants are arguing that the Plaintiff can not ask the Court to reform the Cox Investment Group, LLC ("Cox Investment") mortgage and have the consequence of that reformation be that the individual defendants are

subjected to a deficiency judgment resulting from the foreclosure of the reformed mortgage. The Defendants should not succeed with this argument for two reasons.

First, an action for reformation of a mortgage and an action for the foreclosure of a mortgage are different causes of action that each must stand on their own merits. If the Plaintiff can prove the elements necessary for the mortgage to be reformed, it is entitled to that relief. Then if the Plaintiff can prove that it is entitled to foreclose on the reformed mortgage, it is entitled to that relief also, including the award of a deficiency judgment if that relief is appropriate. The reformation and foreclosure are not exclusive of each other.

The Defendants try to argue that the statute allowing for deficiency judgments in foreclosure actions does not contain a provision allowing for reformation of the mortgage. The statute – S.C. Code Ann §29-3-660 – allows for a deficiency to be established in a foreclosure action. It is not designed to direct or control the establishment of a mortgage or the correction of mistakes made in the creation of the mortgage. Nothing in the statute makes reference to reformation.

Reformation of a mortgage is appropriate when the party requesting the reformation can demonstrate a mistake that was mutual and that resulted in the omission or insertion of a material term. *George v. Empire Fire and Marine Insurance Company*, 344 S.C. 582, 545 S.E.2d 500 (2001). Nothing in the law establishing and defining the reformation cause of action references the foreclosure deficiency judgment statute.

As discussed below, the Plaintiff has made the required showing for the reformation of the mortgage. It has also made the required showing that the reformed mortgage should be foreclosed. Finally it has appropriately requested a deficiency judgment if the proceeds from the sale of the mortgaged property are insufficient to pay the amount due on the Note. The Plaintiff should not be precluded from receiving both of the reliefs requested.

Second, the reformed instrument – the mortgage – is not the “covenant or obligation” that gives rise to the individual Defendants’ liability for the deficiency judgment. That “covenant or obligation” is the Note and its modifications. The

deficiency judgment against the individual Defendants.¹ The Defendants are just wrong on the facts.

Paragraphs 10, 11, and 12 of the Amended Complaint clearly set forth the Note and modifications that Jeffrey E. Cox, Bobby E. Lucas and Darren K. Lucas gave to the Plaintiff. Paragraph 20 of the Amended Complaint sets out a default on the Note and alleges the amount that is due. In paragraph 24 of the Amended Complaint the Plaintiff states that it is entitled to an Order determining the amount due on the Note. Finally, in its Prayer, paragraph b., the Plaintiff asks for a judgment against the Defendants, jointly and severally, for the amount due on the Note. The request could not be clearer. The Defendants misrepresent the facts to the Court to support this argument.

4. The mortgage secures loan extensions and modifications.

The Defendants are just wrong on their fourth point. The first paragraph of the Mortgage clearly states:

This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the note; (b).....

As demonstrated by testimony at trial, the mortgage was never modified. The Note was the only document that was modified or extended. Cox Investment never was, and never needed to be, a signatory on the Note. It, therefore, is of no consequence that the Cox Investment did not sign the note modifications.

Conclusion

The Defendants' seek to capitalize on a scrivener's error in the mortgage and to create issues relating to pleading to undo the transaction that they clearly intended to enter. However, Jeffrey E. Cox, Bobby E. Lucas and Darren K. Lucas all signed a Note promising to pay the Plaintiff money. They did not perform as promised and owe the Plaintiff money. Cox Investment clearly intended to mortgage its real property to secure the Note that Jeffrey E. Cox, Bobby E. Lucas and Darren K. Lucas gave to the Plaintiff. The debt secured by the mortgage has

¹ The Plaintiff only seeks a deficiency judgment against the Defendants Jeffrey E. Cox, Bobby E. Lucas and Darren K. Lucas. The Plaintiff does not seek, nor is it entitled to, a deficiency against

individual Defendants are responsible for the entire debt due on the Note. By seeking a foreclosure the Plaintiff seeks to have the proceeds of the sale of the mortgaged property used to reduce the obligation for which the individual Defendants are responsible. Without the foreclosure and the establishment of a deficiency, the individual Defendants would be responsible for a much larger debt. Therefore, the foreclosure process benefits the individual Defendants. It does not harm them as they suggest.

2. The Plaintiff sets forth a cause of action for reformation of the Mortgage.

Reformation of a mortgage is appropriate when the party requesting the reformation can demonstrate a mistake that was mutual and that resulted in the omission or insertion of a material term. *George v. Empire Fire and Marine Insurance Company*, 344 S.C. 582, 545 S.E.2d 500 (2001). In paragraph 14 of the Amended Complaint filed May 10, 2010, (“Amended Complaint”) the Plaintiff alleges that there was a mistake in the preparation of the mortgage – a “scrivener’s error”. In paragraph 15 of that same Amended Complaint, the Plaintiff alleges that the error was mutual. The Plaintiff clearly set out a cause of action for reformation.

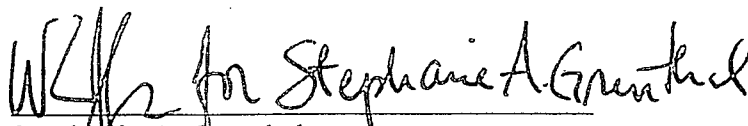
At trial, the Plaintiff’s custodian of records for the mortgage debt at issue testified that it was the intent of the Plaintiff to have Cox Investment mortgage its real property to secure the debt of Jeffrey E. Cox, Bobby E. Lucas and Darren K. Lucas. Jeffery E. Cox testified as manager of Cox Investment that as Cox Investment’s manager, he intended to mortgage real property titled in the name of Cox Investment to secure the debt of Jeffrey E. Cox, Bobby E. Lucas and Darren K. Lucas. If the mortgage offered in evidence at trial does anything other than secure the obligation of Jeffrey E. Cox, Bobby E. Lucas and Darren K. Lucas to the Plaintiff, it needs to be reformed to reflect the true intentions of the parties.

3. The Plaintiff’s pleadings allow the Court to award it Judgment against the Individual Defendants for the amount determined to be due on the Note.

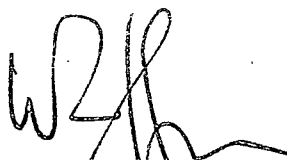
The Defendants suggest that the Plaintiff failed to ask for a judgment on the Note and that because of this error in pleadings, it is not entitled to a

not been paid and therefore mortgage foreclosure is appropriate. The Defendants have offered nothing that can defeat the relief requested.

Respectfully Submitted,



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Attorney for the Plaintiff

July 5, 2011

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NO.: 2009-CP-26-5479

Fidelity Bank,

Plaintiff,

v.

Cox Investments Group, LLC, Jeffrey E.
Cox, Bobby E. Lucas, Darren K. Lucas, and
The Margate Tower at Kingston Plantation
Property Owners' Association, Inc.,

Defendants.

**ORDER PERMITTING PLAINTIFF
TO AMEND COMPLAINT**

CLERK OF COURT
KELANE J. JACOBS-WARD

10 APR 28 PM 2:16

FILED
HORRY COUNTY

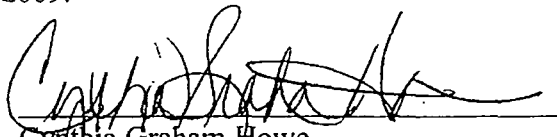
THIS MATTER comes before me on Motion of Scott B. Umstead of Scott B. Umstead, P.A., attorney for the Plaintiff, seeking to amend the Complaint in this action.

IT APPEARS that pursuant to South Carolina Rule of Civil Procedure 15(a), the Defendants in this action would not be prejudiced by the amendment of the Complaint and;

IT IS THEREFORE ORDERED that the Plaintiff be permitted to amend its Complaint in this action and shall serve the Amended Complaint on the Defendants upon the filing of this Order and the Defendants are permitted fifteen (15) days from the date of service to file their responsive pleadings.

IT IS SO ORDERED.

Dated this 23 April 2010
day of ~~December~~, 2009.


Cynthia Graham Howe
Master-in-Equity for Horry County

1
2
3
4 THE COURT:
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11
12

YOUR HONOR, WE ARE GOING TO
CALL STEVE WICKER FROM THE
BANK AS OUR FIRST WITNESS.
ALL RIGHT. MR. WICKER, IF
YOU'LL COME AROUND PLEASE,
SIR, COME ALL THE WAY
AROUND TO YOUR RIGHT AND
PLACE YOUR LEFT HAND ON THE
RED BIBLE AND RAISE YOUR
RIGHT HAND AND BE SWORN OR
AFFIRMED BY THE COURT
REPORTER, PLEASE.

13 AT THIS TIME, STEVE WICKER, HAVING BEEN CALLED TO
14 THE STAND, WAS DULY SWORN AND TESTIFIED AS FOLLOWS:

15 DIRECT EXAMINATION

16 BY MS. GRUNTHAL:

17 Q: Good morning, Mr. Wicker.

18 A: Good morning.

19 Q: Can you please state your full name for the
20 record?

21 A: Steven Parker Wicker.

22 Q: And what is your position at Fidelity Bank?

23 A: I am senior vice president and manager of special
24 assets in the credit administration division of
25 the bank.

1 Q: Okay. And how long have you been there?

2 A: I've been with the bank about 15 years.

3 Q: Okay. What type of experience do you have in
4 finance in general?

5 A: I've been in banking now 40 years and have had a
6 variety of experience from a teller to a loan
7 officer to a branch manager to an area supervisor
8 to mortgage lender, commercial bank lender,
9 manager of credit for decades.

10 Q: Wow, lots of experience. Now are you familiar
11 with a loan given to Jeffrey E. Cox, Darren
12 Lucas, and Bobby Lucas from Fidelity Bank?

13 A: Yes.

14 Q: Okay. And can you please describe the loan in
15 general terms for The Court?

16 A: It's a commercial loan made in the amount of
17 \$860,000 under the terms described in the note
18 and mortgage.

19 Q: Okay.

20 A: Just basic stuff, secured by the property.

21 Q: Okay.

22 MS. GRUNTHAL: YOUR HONOR, I'M GOING TO
23 MOVE TO INTRODUCE THE
24 PROMISSORY NOTE INTO
25 EVIDENCE AS EXHIBIT 1.

1 MR. DIGGS: YOUR HONOR, WE DON'T HAVE
2 ANY OBJECTION.

3 THE COURT: ALL RIGHT. THANK YOU.
4 PLAINTIFF'S EXHIBIT 1 SO
5 ADMITTED.

6 PLAINTIFF'S EXHIBIT NUMBER 1
7 ADMITTED INTO EVIDENCE

8 Q: Okay. Mr. Wicker, could you please identify that
9 document?

10 A: It's a promissory note.

11 Q: And to your knowledge is it a truthful and
12 accurate copy of the note?

13 A: It is. I examined the original.

14 Q: Okay. So that's how you know it's truthful and
15 accurate?

16 A: Yes.

17 Q: Okay. Now who was the note given by; who were
18 the borrowers on the note?

19 A: Bobby E. Lucas, Darren K. Lucas, and Jeffrey E.
20 Cox.

21 Q: And did all three individuals sign the note?

22 A: They did.

23 Q: And what's the date on the note if you don't
24 mind?

25 A: The date on the note is October the 3rd, 2007.

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1 Q: Okay. Now to your knowledge was the note secured
2 by or did it have any collateral attached to it?

3 A: It was secured by a first deed of trust or a
4 first mortgage in South Carolina on 8500 Margate
5 Circle, Unit 1408, Myrtle Beach, South Carolina,
6 real estate.

7 MS. GRUNTHAL: YOUR HONOR, I'M GOING TO GO
8 AHEAD AND INTRODUCE UNLESS
9 THERE'S AN OBJECTION FROM
10 DEFENSE COUNSEL, EXHIBIT 2,
11 THE MORTGAGE.

12 THE COURT: ANY OBJECTIONS TO ---

13 MR. DIGGS: NO, YOUR HONOR.

14 THE COURT: ALL RIGHT. PLAINTIFF'S 2
15 SO ADMITTED.

16 PLAINTIFF'S EXHIBIT NUMBER 2
17 ADMITTED INTO EVIDENCE.

18 Q: Can you identify that document for The Court,
19 please?

20 A: It's the mortgage.

21 Q: And is this a truthful and accurate copy of the
22 mortgage?

23 A: Yes.

24 Q: And how do you know that it is?

25 A: I have examined the original document, as well.

1 Q: Okay. And do you have those documents with you?

2 A: Yes.

3 Q: Okay. Now who was the mortgage given by?

4 A: The mortgage was given by Cox Investments Group,
5 LLC.

6 Q: And the mortgage reflects that the borrower was
7 the company Cox Investment, LLC, but wasn't it
8 the intention of the parties that the mortgage
9 reflect the individuals as the borrower?

10 MR. DIGGS: YOUR HONOR, I OBJECT TO
11 WHAT THE PARTIES INTENDED.
12 THIS WITNESS COULDN'T KNOW.

13 THE COURT: SUSTAINED.

14 MS. GRUNTHAL: OKAY.

15 A: Cox Investment Group, LLC signed by Jeffrey E.
16 Cox as a managing member.

17 Q: Okay.

18 A: As on the mortgage.

19 Q: And during the process of this foreclosure do you
20 know if the mortgage has been reformed during
21 this entire foreclosure action?

22 A: No.

23 MR. DIGGS: YOUR HONOR, WE WOULD OBJECT
24 TO THAT, AS WELL. LEGAL
25 CONCLUSION, THE WITNESS IS

1 TO BE UP TO YOU WHETHER OR
2 NOT THE DOCUMENT WAS
3 REFORMED. AND I THINK THAT
4 THE PREVIOUS ATTORNEY HAD
5 AN ORDER FROM THE COURT TO
6 AMEND HIS ORIGINAL
7 COMPLAINT TO INCLUDE THIS
8 REFORMATION ACTION.
9 THE COURT: ALL RIGHT. BUT THERE'S NOT
10 A DOCUMENT SO FAR REFORMING
11 THE MORTGAGE?
12 MS. GRUNTHAL: NO, NO, MA'AM.
13 THE COURT: ALL RIGHT.
14 MS. GRUNTHAL: SO IS IT OKAY THAT I ASK
15 HIM ABOUT WHAT NEEDS TO BE
16 REFORMED IN THE MORTGAGE OR
17 WHAT WE'RE ASKING TO BE
18 REFORMED IN THE MORTGAGE?
19 THE COURT: YOU MAY ASK HIM WHAT THE
20 BANK WANTS TO BE REFORMED,
21 BUT APPARENTLY THERE'S NOT
22 A DOCUMENT ALREADY
23 REFORMING THE MORTGAGE.
24 MS. GRUNTHAL: NO, OKAY.
25 Q: So the mortgage lists -- Can you look just at the

1 first paragraph of the mortgage and tell us who's
2 identified as the borrower, mortgagor, all the
3 parties?

4 A: The mortgage is with Cox Investment Group, LLC on
5 the first paragraph.

6 Q: In the first paragraph it states that the
7 mortgagor is Cox Investment Group, LLC and in
8 parenthesis it simply says "borrower"?

9 A: Correct.

10 Q: Okay. And to your knowledge as an officer of the
11 bank, what should that from your side of the
12 transaction, what did that need to say instead of
13 borrower?

14 MR. DIGGS: YOUR HONOR, I OBJECT TO THE
15 FORM OF THE QUESTION
16 BECAUSE SHE'S -- I JUST
17 OBJECT TO THE FORM OF THE
18 QUESTION. I THINK WHAT IT
19 SHOULD BE OR -- WE DON'T
20 KNOW, AND SO I WOULD ---

21 MS. GRUNTHAL: OKAY. I CAN REPHRASE THE
22 QUESTION.

23 MR. DIGGS: YES.

24 THE COURT: THANK YOU.

25 Q: What would they like the mortgage to be reformed

1 to say?

2 A: Well, it should include the individuals who
3 signed the promissory note.

4 Q: As what, identified as?

5 A: As borrowers, also.

6 Q: Okay. That's perfect. And what's the date of
7 the mortgage?

8 A: The same date as the promissory note, October the
9 3rd, 2007.

10 Q: What's the property listed as collateral?

11 A: 8500 Margate Circle, Unit 1408, Myrtle Beach,
12 South Carolina.

13 Q: And who signed the mortgage, who executed the
14 mortgage?

15 A: Signed by Jeffrey E. Cox, managing member, Cox
16 Investment Group, LLC.

17 Q: Okay. So you've already stated the amount of the
18 loan. Can you do that one more time?

19 A: \$860,000.

20 Q: And what was the original maturity date of the
21 loan?

22 A: The original maturity date was April the 3rd,
23 2008.

24 Q: Okay. And just to be clear the mortgage secured
25 what property?

1 A: 8500 Margate Circle, Unit 1408, Myrtle Beach,
2 South Carolina.
3 Q: Okay. And in your 40 years of experience, Mr.
4 Wicker, have you seen other instances where a
5 company gave a mortgage for a note that they were
6 not on?
7 MR. DIGGS: YOUR HONOR, I OBJECT TO THE
8 RELEVANCE.
9 THE COURT: OVERRULED.
10 A: Yep.
11 Q: Okay. Now was this a first mortgage?
12 A: Yes.
13 Q: And has the loan been paid off?
14 A: No.
15 Q: Okay. And, Mr. Wicker, can you tell The Court
16 the outstanding balance of the loan?
17 A: As of today the outstanding balance of the loan
18 is \$977,306.39.
19 Q: Okay. And did you execute an authorization and
20 affidavit of debt?
21 A: Pardon me?
22 Q: Did you execute an authorization and an affidavit
23 of debt?
24 A: Yes.
25 Q: Okay.

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1 MS. GRUNTHAL: I'M GOING TO INTRODUCE THIS
2 INTO EVIDENCE AS EXHIBIT 3,
3 YOUR HONOR, UNLESS THERE'S
4 AN OBJECTION.
5 MR. DIGGS: YOUR HONOR, HIS TESTIMONY
6 WOULD BE THE BEST EVIDENCE,
7 AND WE WOULD ASK THAT ---
8 MS. GRUNTHAL: OKAY. WELL, I WAS JUST
9 GOING TO USE ---
10 MR. DIGGS: --- THAT BE THE WAY TO
11 PROCEED.
12 THE COURT: I THINK THAT WOULD BE
13 CUMULATIVE. I DON'T KNOW
14 THAT YOU NEED HIS AFFIDAVIT
15 OF DEBT WITH HIS TESTIMONY.
16 MS. GRUNTHAL: OKAY.
17 Q: Will you tell us the principal due as of June
18 16th, 2011?
19 A: 860,000.
20 Q: So no payments have been made on the loan?
21 A: No, ma'am.
22 Q: Still the original amount?
23 THE COURT: I'M SORRY, WHAT WAS THE
24 INTEREST?
25 A: \$117,306.39 as of today, Your Honor.

1 THE COURT: DO YOU HAVE A PER DIEM?
2 A: Yes, ma'am, I have a per diem of \$119.44.
3 THE COURT: THANK YOU.
4 A: Yes, ma'am.
5 Q: Now when did the borrowers default on the loan?
6 MR. DIGGS: OBJECTION TO THE FORM OF
7 THE QUESTION. IT'S
8 LEADING, HASN'T BEEN
9 ESTABLISHED THERE WAS A
10 DEFAULT.
11 MS. GRUNTHAL: OKAY. I CAN REPHRASE THAT
12 QUESTION.
13 THE COURT: WELL, OKAY. I THINK IT HAS
14 BEEN ESTABLISHED. THE NOTE
15 MATURED ON APRIL THE 3RD OF
16 2008 AND WE KNOW IT HASN'T
17 BEEN PAID.
18 MR. DIGGS: YOUR HONOR, THERE WERE
19 EXTENSIONS TO MY
20 UNDERSTANDING.
21 THE COURT: OKAY. ALL RIGHT.
22 Q: Mr. Wicker, are you aware of any loan
23 modifications or extensions?
24 A: Yes.
25 MS. GRUNTHAL: OKAY. I'M GOING TO MOVE

1 FOR THE FIRST LOAN
2 MODIFICATION TO BE
3 INTRODUCED INTO EVIDENCE.
4 THIS ONE CAN BE PLAINTIFF'S
5 EXHIBIT 3.
6 MR. DIGGS: I'M SORRY, YOUR HONOR, WHAT
7 NUMBER IS THIS?
8 THE COURT: 3, PLAINTIFF'S 3. ANY
9 OBJECTIONS?
10 MR. DIGGS: NO, NO, YOUR HONOR.
11 THE COURT: OKAY. PLAINTIFF'S 3 SO
12 ADMITTED.

13 PLAINTIFF'S EXHIBIT NUMBER 3
14 ADMITTED INTO EVIDENCE

15 MS. GRUNTHAL: THANK YOU, YOUR HONOR.
16 Q: Can you identify this document, Mr. Wicker?
17 A: It's a Promissory Note Modification Agreement.
18 Q: And is this a truthful and accurate copy of it?
19 A: It is.
20 Q: What's the date on that modification?
21 A: April 9th, 2008.
22 Q: And how were the terms of the original note
23 modified?
24 A: The maturity date was extended and the interest
25 rate was adjusted to 5.25 percent on a variable

1 rate scale.

2 Q: Okay.

3 A: With a new maturity date of October the 9th,
4 2008.

5 Q: Okay.

6 MS. GRUNTHAL: YOUR HONOR, I'M GOING TO
7 MOVE TO INTRODUCE
8 PLAINTIFF'S EXHIBIT 4
9 UNLESS THERE'S AN
10 OBJECTION.

11 THE COURT: YOU MAY NEED TO SHOW THAT
12 TO MR. DIGGS FIRST.

13 MR. DIGGS: YES, YOUR HONOR, IS THAT
14 THE SECOND?

15 MS. GRUNTHAL: YES.

16 THE COURT: PLAINTIFF'S 4, THAT'S THE
17 SECOND MODIFICATION, THAT'S
18 SO ADMITTED WITHOUT
19 OBJECTION.

20 PLAINTIFF'S EXHIBIT NUMBER 4
21 ADMITTED INTO EVIDENCE

22 Q: Can you please identify this document for The
23 Court?

24 A: It's a Promissory Note Modification Agreement.

25 Q: And what's the date of this document?

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1 A: October the 9th, 2008.

2 Q: And how were the terms of the original note
3 modified in this document?

4 A: The maturity date was extended until April the
5 9th, 2009, and the interest rate was adjusted to
6 5.5 percent per annum based on a variable rate
7 scale.

8 Q: And can you turn to the second page of that
9 document and tell me who were the signators on
10 the back?

11 A: Bobby E. Lucas, Darren K. Lucas, and Jeffrey E.
12 Cox.

13 Q: And were they all three the original borrowers on
14 the note?

15 A: Yes.

16 Q: And is this a note and a mortgage modification or
17 is this simply a note modification?

18 A: A note modification.

19 Q: Okay. Now can you explain to The Court how we
20 ended up in this situation with the bank wanting
21 to foreclose on their loan?

22 A: They didn't pay the loan back.

23 Q: Okay. And the entire amount was due ---

24 A: The amount came due and ---

25 Q: --- in April -- What was the date?

1 MR. DIGGS: MAYBE IF SHE COULD REPHRASE
2 THE QUESTION.
3 MS. GRUNTHAL: OKAY.
4 THE COURT: WHY DON'T YOU REPHRASE THE
5 QUESTION IF YOU CAN?
6 MS. GRUNTHAL: OKAY. I WILL..
7 Q: What was the purpose, just in your general
8 knowledge of banking, what is the purpose of
9 having a corporate resolution in this situation?
10 A: It's part of the process of procuring the loan
11 and completing the documentation associated with
12 the promissory note and the mortgage.
13 Q: What was the purpose of, specifically what was
14 the purpose of the certificate of managers?
15 A: To identify who were the officers that signed.
16 Q: Exactly, or perfect. And what was the purpose of
17 the corporate resolution, Exhibit 7?
18 A: As I read the entire document, to specify exactly
19 what and who had the authorization to do what
20 with this transaction.
21 MR. DIGGS: YOUR HONOR, WHAT I WAS
22 GOING TO OBJECT TO WITH
23 THIS WAS HE CAN CERTAINLY
24 TESTIFY TO WHAT THE BANK'S
25 INTENT WAS IN SEEKING SUCH

1 A: It's my responsibility to attend these
2 proceedings when asked to attend and represent
3 the bank in these foreclosure actions as an
4 officer of the bank.

5 Q: All right. So you don't have any involvement
6 with these Defendants, you've never had any
7 personal involvement with them; is that your
8 testimony?

9 A: No, sir.

10 Q: It's not your testimony or it is?

11 A: It's my testimony that I have not had any
12 involvement with these individuals.

13 Q: All right. And let me ask you again, what is
14 your position with the bank?

15 A: I manage the special assets at Fidelity Bank in
16 credit administration that is responsible for
17 foreclosures, bankruptcies, and other collections
18 of loans in default, et cetera.

19 Q: So if I asked you about any conversations that
20 took place between the bank and these Defendants
21 regarding anything with respect to this
22 transaction as a whole, your answer would be you
23 don't know, correct? You don't know?

24 A: I would have to know more about your question
25 than that to answer.

1 Q: All right. For example, were you present to any
2 conversations involving any of these Defendants
3 in the bank, Mr. Smith, for example, about
4 interest payments being made, decision by the
5 bank to reject them, and to proceed with
6 foreclosure? Do you have any knowledge as to
7 whether or not any conversations like that ever
8 took place?

9 A: I was not present.

10 Q: All right. And so if there was conversations
11 that took place that involved an opportunity for
12 the bank to take a course of action that would
13 involve less risk and possibly more profit to the
14 bank, you wouldn't know anything about it?

15 A: I was not present.

16 Q: And so you can't deny that opportunities existed
17 for the bank in this very case before the
18 decision was ever made to go into foreclosure,
19 that the Defendants had offered an opportunity to
20 continue to pay payments of interest to the bank
21 and to assist in resolving the issue to the
22 satisfaction of the bank at least in terms of
23 economical consideration?

24 MS. GRUNTHAL: OBJECTION, YOUR HONOR. THE
25 DEFENSE COUNSEL IS ASSUMING

1 THE COURT:

I THINK THAT'S WHAT HIS
2 RESPONSE WOULD BE. I THINK
3 EVERYBODY IN THE COURTROOM
4 KNOWS THAT'S WHAT HIS
5 RESPONSE WAS GOING TO BE.

6 MR. DIGGS:

ALL RIGHT. BUT I THINK
7 IT'S RELEVANT, YOUR HONOR,
8 FROM MY PERSPECTIVE AS TO
9 WHETHER OR NOT IN THE WHOLE
10 SCHEME OF THINGS AND THE
11 TOTALITY OF THE
12 CIRCUMSTANCES OF THIS CASE
13 WHETHER OR NOT ENTITLING
14 THE BANK TO THE RELIEF
15 THAT'S BEING SOUGHT.

16 THE COURT:

OKAY. YOU MAY GO AHEAD AND
17 ASK THE QUESTION THEN.

18 Q: And my question again is if the conversation took
19 place between representatives of the bank and
20 these Defendants wherein it was discussed and
21 offered an alternative to what relief the bank is
22 being sought now that would have been possibly
23 more profitable or in the better interest of the
24 bank than the foreclosure, you wouldn't know
25 about it; isn't that correct?

1 A: I wasn't present in any conversations that you
2 might be alluding to.

3 Q: Right, and is it also your testimony that you're
4 not curious about it?

5 A: I beg your pardon?

6 Q: Is it also your testimony you're not even curious
7 about that?

8 A: No, that is not my testimony.

9 Q: So you are curious; is that your testimony?

10 A: I don't understand your comment.

11 Q: What about it do you not understand?

12 A: The term curious.

13 Q: Yes, are you curious to whether or not the bank
14 had engaged itself in any discussions about how
15 to otherwise deal with this case other than
16 foreclosure?

17 A: They did do that.

18 Q: How do you know they did that?

19 A: Because I talked with the officers who were
20 involved in those transactions.

21 Q: All right. And what did they tell you about that
22 issue?

23 A: That would be a question for them to answer.

24 Q: Well, I'm asking you what did they tell you, if
25 you remember, maybe you don't remember.

1 A: Made every effort to come up with the loan, but
2 it matured, was in default and could not
3 accomplish that and ---

4 Q: Any discussions of the possibility of the
5 Defendants making additional interest payments?

6 A: I'm not aware of that precise comment, but
7 certainly opportunities were there to pay the
8 loan off. The loan was not repaid and was in
9 default.

10 Q: But you see where I'm going with that? Did the
11 bank consider, to your knowledge, extending
12 additional interest payments under the terms that
13 had been set out already in the course of dealing
14 with the Defendants, so to give them a little
15 additional time to do what the bank ultimately
16 wanted done and that is to pay the note?

17 A: The modifications that were executed by the bank
18 demonstrate what you've just described as
19 additional opportunities to repay the loan over
20 additional periods of time and time and time.

21 Q: My question -- And there were two modifications,
22 correct?

23 A: Correct.

24 Q: So it wasn't time and time and time. With two
25 additional modifications, and based on that do

1 you know if there were any discussions regarding
2 any additional modifications beyond those two?

3 A: I was not present in those discussions to answer
4 the question if there were additional
5 modifications.

6 Q: All right. Do you recall ever having a
7 discussion with anyone about that issue?

8 A: Not the question you're asking.

9 Q: Now when was the first time you had an
10 opportunity to look at this file from the bank's,
11 you know, and when I mean "the file," I don't
12 mean your attorney's file or any of that. I mean
13 the paperwork the bank kept on record involving
14 this loan?

15 A: At the time it went in default.

16 Q: So you wouldn't have had any knowledge of it at
17 all under normal working circumstances until the
18 default occurred?

19 A: That's correct.

20 Q: You testified about here today. Now who normally
21 draws up the documents that are used in these
22 types of transactions when Fidelity Bank is
23 involved in them?

24 A: The bank draws those documents with the exception
25 of those documents that require legal drafting,

1 and those would be handled by the attorney hired
2 by the bank.

3 Q: All right. And in this case can you draw a
4 distinction for me or identify for me which
5 documents the bank would say were legal documents
6 and which ones were not?

7 A: Well, they're all legal binding documents that
8 are contained in the note and the mortgage.

9 Q: I understand what you're -- That's not responsive
10 though. What I'm asking is in this case can you
11 identify for me which documents are legal
12 documents that would have been drafted by the
13 attorney and which documents are not that type
14 that would have been drafted by the bank?

15 A: All of our documents, sir, are prepared by
16 attorneys ---

17 Q: Okay.

18 A: --- when they are created:

19 Q: And in your case, the mortgage document, for
20 example, was it prepared by an attorney or was it
21 prepared by the bank?

22 A: Prepared by the attorney.

23 Q: And do you recall or do you have any knowledge in
24 this case about the specific origins of the
25 mortgage that's used in your case? Do you

1 understand the question?

2 A: No, I don't.

3 Q: Where did it come from, who produced it, where
4 did it come from, how did the bank get it in its
5 hands?

6 A: It would come from the attorney that handled the
7 closing.

8 Q: All right. And who was that?

9 A: I believe it's -- I don't recall that name right
10 off the top of my head.

11 Q: All right. Let me ask you this -- That's okay.

12 A: You have that reference point. I think it's on
13 the settlement statement there. I just don't
14 recall the name.

15 MS. GRUNTHAL: YOUR HONOR, I DO. IF THE
16 COURT WOULDN'T OBJECT I CAN
17 HAND HIM OR TELL HIM THE
18 NAME OF THE CLOSING
19 ATTORNEY IF THE DEFENSE
20 ATTORNEY WANTS ME TO.

21 THE COURT: DID Y'ALL DO DISCOVERY IN
22 THIS CASE?

23 MR. DIGGS: YES.

24 THE COURT: DO YOU KNOW WHO IT WAS, MR.
25 DIGGS?

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1 MR. DIGGS: WELL, I THINK I DO, BUT I'M
2 CONFUSED.

3 THE COURT: MR. WICKER DOESN'T KNOW.

4 A: I mean, I just don't recall the name. I've seen
5 the documents and I know ---

6 THE COURT: YOU KNOW AN ATTORNEY CLOSED
7 IT?

8 A: Sure.

9 Q: And let me ask this, physically where did the
10 closing take place?

11 A: It would have been in the attorney's office.

12 Q: Your testimony is that this mortgage was signed
13 in an attorney's office?

14 A: Sir, I wasn't there to see that, so I can't
15 answer that question since I wasn't there.

16 Q: All right. You've alleged in your complaint
17 wherein you seek a reformation of a mortgage to
18 reform the mortgage language, okay. You allege
19 that there was a scrivener's error. Now do you
20 have any knowledge about that fact?

21 A: You turned around, I couldn't hear what you were
22 saying. I'm sorry.

23 Q: Can you testify about that particular matter?
24 Who made the error, how did it occur, when was it
25 first discovered that it was an error?

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1 A: You're referring to what now?

2 Q: Your complaint.

3 A: Well, be more specific. What in the complaint
4 are you pointing to?

5 Q: I'll show you a copy of the complaint that was
6 filed in the case. Paragraph 14 states that the
7 mortgage contains a scrivener's error.

8 A: Okay. That's fine. I was wondering what you
9 were referring to.

10 Q: Okay. Now my question is whether or not you have
11 any information about that alleged error?

12 A: As referenced in the complaint, yes. The
13 scrivener's error was the matter of the name Cox
14 Investment Group, LLC not including the
15 individuals who were also party to the
16 obligation.

17 Q: All right. So beyond that can you testify about
18 the drafting of the mortgage and who made the
19 error?

20 A: I cannot respond to that.

21 Q: All right.

22 A: I wasn't there.

23 Q: What information do you have that suggests it was
24 an error?

25 A: Typically that document contains everyone who's a

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1 borrower, everyone who signs the obligation. So
2 does that answer your question?

3 Q: Well, in this case not really because this is --
4 You brought suit on this case. It doesn't
5 involve other typical situations. But in this
6 particular instance when you've alleged, and
7 that's the foundation, with all due respect, in
8 my opinion for your lawsuit to reform the
9 mortgage. I'm asking you if you can tell us who
10 made that error when it was first discovered to
11 be an error? Do you know the answer to either
12 one of the questions?

13 A: I can't answer the question as to who made the
14 error because wasn't there in the preparation of
15 the document.

16 Q: All right. Then how do you know it was an error?

17 A: Because that's what I was informed.

18 Q: All right. And somebody told you it was an
19 error?

20 A: Well, it's an obvious error.

21 Q: When did the bank first discover it was an error
22 if it was obvious?

23 A: I don't recall.

24 Q: All right. Wasn't immediately; would you agree
25 with me there?

1 A: You mean the date of the note? It wasn't obvious
2 on the date of the note?
3 Q: Right.
4 A: Probably not.
5 Q: Okay. And how long's the maturity date; how long
6 in the future was the note to mature?
7 A: April the 3rd, 2008.
8 Q: All right. And when was the note signed?
9 A: October 3rd, 2007.
10 Q: Okay. So you would agree with me no one did
11 anything in that period of time to do anything
12 regarding correcting the alleged error?
13 A: I did not.
14 Q: And you're not aware of anything anybody else did
15 during that time frame to correct the alleged
16 error?
17 A: I'm not aware.
18 Q: And then someone at the bank, and I realize it
19 probably wasn't you, but someone at the bank sat
20 down and tendered a modification agreement for
21 the Defendants to sign, correct?
22 A: There was two modifications.
23 Q: Your Exhibit 3, for example?
24 A: Right.
25 Q: Do you know the date on that modification?

1 A: I believe that's been submitted as an exhibit.

2 Let me see if I can put my hands on it.

3 Q: Exhibit Number 3.

4 A: April 9th, 2008.

5 Q: All right. Now did the alleged error get
6 discovered by that time?

7 A: I'm sure.

8 Q: Pardon?

9 A: Certainly, I would think so.

10 Q: And was anything done at that time to correct it?

11 A: The modification agreement reflects the
12 individuals' names as you see at the top.

13 Q: Right, but does it do anything to modify the
14 terms of the mortgage?

15 A: We've already testified that the mortgage was not
16 modified.

17 Q: Right, and so you're saying, "Well, we knew the
18 mortgage had an error in it when we modified the
19 note, but we went ahead and made a conscious
20 decision not to do anything about it and go on as
21 it is"?

22 MR. MOORE:

OBJECTION, YOUR HONOR,

23 THAT'S A

24 MISCHARACTERIZATION OF THE

25 TESTIMONY.

1 MR. DIGGS: HE HASN'T ANSWERED THE
2 QUESTION.
3 THE COURT: WELL, THAT'S BECAUSE MR.
4 MOORE OBJECTED. SUSTAINED,
5 SO PLEASE REWORD THAT.
6 Q: Question that I have is your testimony is the
7 bank knew about the error by the time of the
8 first extension but it didn't do anything to
9 correct it, correct?
10 A: The modification refers to the individuals who
11 executed that modification.
12 Q: All right. But it doesn't do anything to modify
13 the mortgage; you understand the difference?
14 A: Yes.
15 Q: The extension didn't do anything to correct the
16 mortgage error that you say the bank already knew
17 about, correct?
18 A: I'm not aware of exactly the way you're
19 describing it. The sequence of events is not to
20 my knowledge. I don't know exactly where, when
21 that was.
22 Q: All right. But you agree with me that no one did
23 anything at that point in time to change the
24 terms of the mortgage?
25 A: The terms of the mortgage haven't changed.

1 Q: All right. And then how long was that
2 modification intended to last?

3 A: What was the -- The closing date was October the
4 9th, 2008.

5 Q: All right. And then as of the 9th of 2008 the
6 second extension was signed, correct, isn't that
7 what your Exhibit 4 ---

8 A: October 9th, 2008.

9 Q: And it granted another, what is that, six or
10 seven month extension?

11 A: From October the 9th, 2008 until April the 9th,
12 2009.

13 Q: Yes, and again revisit that note. Nothing was
14 done by the bank to go back and modify the
15 alleged error in the mortgage, correct?

16 A: The modification ---

17 Q: Well, ---

18 MR. MOORE: OBJECTION, YOUR HONOR, LET
19 THE WITNESS ANSWER THE
20 QUESTION.

21 MR. DIGGS: IT WAS A YES OR NO ANSWER
22 AND THEN HE CAN ANSWER IT.

23 THE COURT: IF YOU CAN ANSWER YES OR
24 NO.

25 A: Would you please restate the question?

1 Q: Was anything done by the bank at that time, on
2 October the 9th, 2008, was anything done to go
3 back and correct any alleged error in the
4 mortgage?

5 A: No.

6 Q: All right. And why is that?

7 A: There was -- I don't have, I don't have the facts
8 as to why at that point that might have been done
9 or not done.

10 Q: Now with respect to your Exhibit 6 do you know
11 where that document originated, who drafted it?

12 A: It's a bank prepared document.

13 Q: All right. And so would that be one that the
14 bank would have on its computers and you just hit
15 the print button?

16 A: The framework of the document, certainly.

17 Q: All right. And if you look --

18 MR. DIGGS: MAY I APPROACH THE WITNESS,
19 YOUR HONOR?

20 THE COURT: YOU MAY.

21 Q: Look at that. And is that the entirety of that
22 document?

23 A: It's a one page form.

24 Q: And the signature, who signed the document?

25 A: Jeffrey E. Cox and Brooke E. Cox.

1 Q: But it's a corporate resolution, correct?

2 A: That's correct.

3 Q: And do you know, and I'm not yelling at you or
4 anything, and I don't mean to, but do you have
5 any knowledge about when that was executed or
6 where it was executed?

7 A: The date on the document is 9/26/2007.

8 Q: All right. Does that give you any information
9 about where it might have been executed?

10 A: It does not have a location on the document.

11 Q: All right. Based on your experience with these
12 matters if you can, can you give me an educated
13 opinion about or a guess about where it might
14 have been done?

15 A: Part of the closing or part of the transaction at
16 closing.

17 Q: And again, I'm sorry if I asked you this before
18 and I've forgotten, your testimony is you're not
19 sure where this closing took place?

20 A: I was not present so I can't answer the question
21 as to where it took place, but it ---

22 Q: All right. You haven't had any discussion with
23 anybody about where it took place?

24 A: I've had discussions with other officers at the
25 bank as to where these transactions take place.

1 yes.

2 Q: All right. Let me ask you if you have a belief
3 as to where it took place?

4 A: I have a belief it took place in the attorney's
5 office.

6 Q: But you don't know who that was or where it was?

7 A: Well, if someone would hand me the document I've
8 asked for, I would be glad to state the
9 attorney's name that's in the document itself. I
10 just don't recall the gentleman's name.

11 Q: Okay. What I was talking about right now is
12 Exhibit 6.

13 A: Sir?

14 Q: What I'm looking at, the document I'm referring
15 to right now is Exhibit 6. And there's no
16 indication there where it was executed, correct?

17 A: There's no location of the document described on
18 the document.

19 Q: Are there any witnesses to it?

20 A: There is not a witness -- It's not required to be
21 witnessed.

22 Q: All right.

23 A: So there's not a witness line.

24 Q: Now in the testimony you initially referred to
25 the security in this case as a deed of trust.

1 A: In South Carolina it's called a mortgage.

2 Q: All right. Now you're not legally trained, law
3 trained?

4 A: No.

5 Q: And you're not, by way of background, you're not
6 qualified to give The Court a definition as to
7 any possible difference between a deed of trust
8 and a mortgage?

9 A: I'll leave that up to you all.

10 Q: Okay.

11 MR. DIGGS: YOUR HONOR, I DON'T HAVE
12 ANYTHING ELSE OF THIS
13 WITNESS.

14 THE COURT: ALL RIGHT. THANK YOU. MR.
15 GRUNTHAL, ANYTHING ON RE-
16 DIRECT?

17 MS. GRUNTHAL: YES, JUST A FEW QUESTIONS,
18 YOUR HONOR.

19 RE-DIRECT EXAMINATION

20 BY MS. GRUNTHAL:

21 Q: Mr. Wicker, were these documents -- Actually let
22 me just, in particular Exhibit 6 and 7, were
23 those documents kept in the normal course of
24 business at the bank?

25 A: Yes.

1 Q: And how about the note and modifications of the
2 mortgage, was that in the normal course of
3 business?
4 A: Yes.
5 Q: And are you a custodian of the records at the
6 bank?
7 A: Yes.
8 Q: Okay. Now was it the intention of the bank to
9 get a mortgage on 8500 Margate Circle, Unit ---
10 A: 1408.
11 Q: --- 1408 as security for this note?
12 A: Yes.
13 Q: Okay. And the note was kept and recorded and
14 placed into the normal record system of the bank?
15 A: Correct.
16 Q: Okay.
17 MS. GRUNTHAL: THANK YOU, YOUR HONOR.
18 THE COURT: ALL RIGHT. THANK YOU.
19 ANYTHING ON RE-CROSS, MR.
20 DIGGS?
21 MR. DIGGS: NOTHING, YOUR HONOR.
22 THE COURT: THANK YOU. YOU MAY STEP
23 DOWN MR. WICKER.
24 A: Thank you.
25 THE COURT: JUST MAKE SURE YOU LEAVE

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1 (ON THE RECORD)

2 THE COURT:

ALL RIGHT, MR. COX. YOU
3 WERE ALREADY SWORN, WEREN'T
4 YOU?

5 COURT REPORTER:

YES, YOUR HONOR.

6 THE COURT:

AND I THINK I REMINDED YOU
7 THAT THERE'S WATER THERE
8 AND SOME CUPS. ALL RIGHT,
9 MR. MOORE.

10 DIRECT EXAMINATION

11 BY MR. MOORE:

12 Q: Mr. Cox, my name is Cliff Moore. I'm an attorney
13 for Fidelity Bank. I have some questions about
14 this litigation. First, can you tell me what
15 your name is?

16 A: Jeffrey Eugene Cox..

17 Q: And what's your address?

18 A: 4838 Wood Fern Road, Seagrove, North Carolina.

19 Q: And are you the same Jeffrey E. Cox that's named
20 in this action Fidelity Bank versus Cox
21 Investment Group, LLC?

22 A: Yes, sir.

23 Q: I'm going to hand you a document which has been
24 marked as Plaintiff's Exhibit Number 1. It's a
25 promissory note dated October 3rd, 2007. I ask

1 you to look at that document, look at the second
2 page. Is that your signature?

3 A: Yes, sir.

4 Q: Okay. And do you recall that you borrowed money
5 from the Plaintiff on that date?

6 A: Yes, sir.

7 MR. DIGGS: YOUR HONOR, I KNOW IT'S
8 FOUNDATIONAL, BUT I OBJECT
9 TO THE LEADING OF THE
10 WITNESS.

11 MR. MOORE: YOUR HONOR, ---

12 THE COURT: I WISH YOU WOULDN'T UNTIL
13 WE CAN GET THROUGH IT A
14 LITTLE BIT. I MEAN, IT'S
15 NOT A REAL IMPORTANT
16 LEADING QUESTION.

17 MR. DIGGS: WELL, AS I SAID, I'VE GOT
18 -- I'M HAPPY.

19 MR. MOORE: YOUR HONOR, PROCEDURALLY I
20 ASK THE COURT TO ALLOW ME
21 TO TREAT THIS WITNESS AS A
22 HOSTILE WITNESS. HE'S ONE
23 OF THE DEFENDANTS IN THIS
24 ACTION. WE ARE
25 REPRESENTING THE PLAINTIFF.

1 TO ---
2 THE COURT: I'M SORRY?
3 MR. DIGGS: I DO WANT TO OBJECT TO
4 THAT.
5 THE COURT: OKAY. ON WHAT GROUNDS?
6 MR. DIGGS: GROUNDS THAT IT'S NOT SHOWN
7 HERE THAT HE'S GOING TO BE
8 A HOSTILE WITNESS. THERE'S
9 NOT BEEN ANY SHOWING THAT
10 THE TESTIMONY GIVEN BY THIS
11 WITNESS IS GOING TO BE
12 ANYTHING OTHER THAN WHAT
13 THE PLAINTIFF EXPECTED HIM
14 TO TESTIFY TO. SO FOR THAT
15 REASON I OBJECT.
16 THE COURT: ALL RIGHT.
17 MR. MOORE: MAY I PROCEED, YOUR HONOR?
18 THE COURT: I OVERRULE YOUR OBJECTION.
19 YOU MAY PROCEED.
20 Q: This note suggests that you received 860,000 or
21 that you and the other borrowers received
22 \$860,000. Did you receive \$860,000?
23 A: No, sir.
24 Q: How much did you receive?
25 A: Nothing.

1 Q: You received nothing from this transaction?
2 A: Well, I mean, we didn't personally, no, sir.
3 Q: What were the proceeds of this loan used for?
4 A: It paid off a note at another bank.
5 Q: Were you obligated on that note?
6 A: Yes.
7 Q: And so you were obligated to pay another bank a
8 note and so you used the proceeds of this loan to
9 pay off that bank?
10 A: I assume Fidelity did, yes, sir.
11 Q: Was that other bank paid off?
12 A: Yes, sir.
13 Q: Do you owe that other bank money?
14 A: No, sir.
15 Q: How much was that other bank paid?
16 A: I'm not sure. It would be somewhere in the
17 neighborhood of the loan amount.
18 Q: Show you what's been marked as Plaintiff's
19 Exhibit Number 3. I'll ask you the same
20 question. Is that your signature on page two?
21 A: Yes, sir.
22 Q: You signed that document?
23 A: Yes, sir.
24 Q: There are two other signatures on that document.
25 Do you see those?

1 A: Yes, sir.

2 Q: Whose are those?

3 A: The names are Darren Lucas and Bobby Lucas.

4 Q: Did you see them sign this?

5 A: I don't recall.

6 Q: Did you attend the closing with them on this
7 modification?

8 A: I would assume so. I don't have any specific
9 recollection.

10 Q: Let me show you what's been marked as Plaintiff's
11 Exhibit Number 4, which is another note
12 modification with a signature on the last page of
13 that. Is that your signature?

14 A: Yes.

15 Q: Show you what's been marked as Plaintiff's
16 Exhibit Number 6. Do you see that document?

17 A: Yes, sir.

18 Q: What is that document?

19 A: It says a certificate of managers of limited
20 liability company.

21 Q: Did you sign that document?

22 A: It appears so.

23 Q: In what capacity did you sign that?

24 A: As a part of Cox Investment Group, I would
25 assume.

1 Q: Are you part of Cox Investment Group?
2 A: Yes, sir.
3 MR. DIGGS: YOUR HONOR, I OBJECT TO THE
4 ASSUMPTION. THE QUESTION
5 WAS WHAT CAPACITY WAS IT
6 SIGNED. THE DOCUMENT
7 SPEAKS FOR ITSELF. I
8 OBJECT TO COUNSEL'S
9 QUESTION, AND I OBJECT TO
10 THE ANSWER AS BEING NON-
11 RESPONSIVE, AS WELL,
12 BECAUSE HE CANNOT ASSUME.
13 AND ON THAT BASIS I ASK THE
14 COURT TO STRIKE IT.
15 THE COURT: YOU'RE OBJECTING TO YOUR
16 CLIENT'S ANSWER?
17 MR. DIGGS: I'M OBJECTING TO HIS ANSWER
18 THAT, "I ASSUME." THAT'S
19 WHAT I OBJECT TO. IF YOU
20 LOOK AT THE DOCUMENT IT
21 SHOWS, IT REFLECTS HOW IT
22 WAS SIGNED. THE QUESTION
23 WAS LEADING IN RESPECT TO
24 TRY TO ELICIT A DIFFERENT
25 ANSWER OTHER THAN WHAT'S

1 THE COURT: WAIT JUST A MINUTE. WAIT
2 JUST A MINUTE, MR. COX.
3 YOUR ATTORNEY HAS OBJECTED.
4 LET'S -- PLAINTIFF'S
5 EXHIBIT 6 YOU ADMIT YOU
6 SIGNED THIS DOCUMENT, MR.
7 COX?
8 A: Yes, ma'am.
9 THE COURT: ALL RIGHT. IS THAT ENOUGH,
10 MR. MOORE?
11 MR. MOORE: YES, YOUR HONOR.
12 THE COURT: ALL RIGHT. THANK YOU.
13 Q: Let me hand you what's been marked as Plaintiff's
14 Exhibit Number 7. Do you see that?
15 A: Yes, sir.
16 Q: Is that your signature on that document?
17 A: Yes, sir.
18 Q: And in what capacity did you sign that document?
19 A: I mean, again, I signed whatever the bank asked
20 me to sign. This is not something I prepared.
21 Q: What does it say underneath your signature?
22 A: "Jeffrey E. Cox, Managing Member."
23 Q: Managing member of what?
24 A: I would assume Cox Investment Group.
25 Q: What does it say above your signature?

1 A: "Cox Investment Group, LLC."
2 Q: So your signature line says, "Cox Investment
3 Group, LLC," you signed it, and then it says, "By
4 its managing member"?
5 A: It says, "By Jeffrey E. Cox," yes, sir.
6 Q: And what does it say underneath your signature?
7 A: "Jeffrey E. Cox, Managing Member."
8 Q: Did you sign that document as the managing member
9 of the LLC?
10 A: I signed the document the bank asked me to sign.
11 Q: Mr. Cox, please answer my question. Did you sign
12 that document as the managing member of the LLC?
13 A: Sir, this was four years ago, or three and a half
14 years ago. I mean, the bank put it in front of
15 me and I signed it.
16 Q: That's your signature?
17 A: We established that, yes, sir.
18 Q: Let me hand you what's been marked as Plaintiff's
19 Exhibit Number 2. Do you recognize that
20 document?
21 A: It appears to be a mortgage.
22 Q: Look at the last page of that document. It might
23 not be the last page, but the page that purports
24 or contains your signature. Is that your
25 signature?

1 A: Yes, sir.

2 Q: And what does it say above your signature?

3 A: Cox Investment Group, LLC.

4 Q: And then it has your signature?

5 A: Yes, sir.

6 Q: And what does it say underneath your signature?

7 A: It says, "Managing Member."

8 Q: What did you intend to do when you signed that
9 document?

10 A: I'm not -- I mean, I assume I signed it because
11 either the attorney or the banker asked me to
12 sign it.

13 Q: Did you understand this was a mortgage?

14 A: That's what it appears to be, yes, sir.

15 Q: At the time that you executed this mortgage did
16 Cox Investment, LLC own the property that's
17 described in here as 8500 Margate Circle, Unit
18 1408?

19 A: When was that signed, sir?

20 Q: I'll let you look at that.

21 A: Yes, sir.

22 Q: And that date, the date of the mortgage which is
23 reflected as October the 3rd, 2007, that's the
24 same day as the original note, the promissory
25 note, Plaintiff's Exhibit Number 1, isn't it?

- 1 A: Yes, sir.
- 2 Q: So at this point in time on the date that you
- 3 signed this note and on the date that you signed
- 4 this mortgage did Cox Investment, LLC own the
- 5 property that's described as 8500 Margate Circle,
- 6 Unit 1408, Myrtle Beach?
- 7 A: Yes, sir.
- 8 Q: Did you understand you were putting a mortgage on
- 9 that piece of property?
- 10 A: Yes.
- 11 Q: Was it your intension on that date to put a
- 12 mortgage on the property?
- 13 A: It was our intension to get a loan or to ---
- 14 Q: You testified that you understood you were
- 15 signing a mortgage, and my question was, was it
- 16 your intention to put a mortgage on that piece of
- 17 property on that date?
- 18 A: Well, as I said, our intension was to get a loan
- 19 to pay off the original bank.
- 20 Q: A loan secured by a mortgage?
- 21 A: It was secured by a mortgage, yes, sir.
- 22 Q: This loan, which is reflected by the promissory
- 23 note Exhibit Number 1 shows that \$860,000 was
- 24 loaned to you and to two other individuals,
- 25 correct?

1 A: Yes, sir.

2 Q: On that same day or in that same time did the
3 bank that's pursuing you on this collection, did
4 they also lend Cox Investment, LLC anything?

5 A: I'm not for sure how to answer that. I mean,
6 we've got a promissory note here made out to the
7 three of us.

8 Q: At this point in time you testified that you were
9 the managing member of the LLC.

10 A: Yes, sir.

11 Q: At that point in time when you were the managing
12 member of the LLC, did the LLC borrow money from
13 the bank?

14 A: We borrowed the money, the three of us borrowed
15 the money.

16 Q: Just the individuals?

17 A: That's all that ---

18 Q: There wasn't another note, that's my question?
19 There's not another note somewhere where the LLC
20 ---

21 A: Not that I'm aware of.

22 Q: Well, who else would be aware other than you, the
23 managing member of the LLC, as to whether or not
24 the LLC borrowed money at that point in time from
25 the bank?

1 A: Not for sure I understand your question, sir.

2 I'm not, again, I'm not sure I understand what
3 we're trying to accomplish here.

4 Q: Let me ask you this, Mr. Cox. You understand
5 that the LLC is challenging the mortgage on this
6 property? You understand that?

7 A: Yes, sir.

8 Q: All right. My question for you, I'm trying to
9 understand the challenge because all I've heard
10 so far is that, "We didn't sign the mortgage," or
11 "we didn't get any value," because it just says
12 the LLC is the borrower, and the LLC wasn't the
13 borrower. My question for you is, is there a
14 note that we don't know about, another loan from
15 the bank to you that that mortgage would serve
16 collateral for or is this the only transaction
17 you know about?

18 A: Not that I'm aware of.

19 Q: This is the only transaction you know about?

20 A: Yes, sir.

21 Q: "This" is the one that's reflected in Exhibit
22 Number 1?

23 A: Yes, sir.

24 MR. MOORE: BEG THE COURT'S INDULGENCE
25 FOR ONE MOMENT.

1 THE COURT: CERTAINLY.
2 MR. MOORE: THAT'S ALL THE QUESTIONS WE
3 HAVE FROM THIS WITNESS.
4 THE COURT: OKAY.
5 MR. DIGGS: MAY IT PLEASE THE COURT.

6 CROSS EXAMINATION

7 BY MR. DIGGS:

8 Q: Let's look at Exhibit Number 7. Plaintiff's
9 Exhibit Number 7. Mr. Cox, do you recall having
10 seen that document before?

11 A: No, sir, not specifically.

12 Q: All right. But you're not denying that's your
13 signature?

14 A: No, sir.

15 Q: All right. So that's not an issue in the case,
16 correct?

17 A: Not with me.

18 Q: As far as you know. No one went in and forged
19 your signature on that document?

20 A: If they did they did a good job.

21 Q: Okay. Now with respect to the document itself,
22 did you write it?

23 A: No, sir.

24 Q: And let me ask you this, did the corporation have
25 an attorney at that time who drafted these

1 documents for the corporation?

2 A: No, sir.

3 Q: All right. Do you have any information about who
4 would have drafted that particular document, and
5 "that," being Exhibit Number 7?

6 A: I would assume that the bank. It was something
7 that just printed out with their loan documents.

8 Q: All right. But there's no doubt you didn't write
9 it and no one wrote it on your behalf or on
10 behalf of the corporation?

11 A: No, sir.

12 Q: Other than, we understand the role that it is to
13 play, but as far as your concern is and there's
14 no doubt about it, it was drafted by this party,
15 being the Plaintiff?

16 A: Yes, sir.

17 Q: All right. Did Cox Investment Group, LLC receive
18 any benefit from any loan paid to the individual
19 Defendants by Fidelity Bank?

20 A: No, sir.

21 Q: In fact, who benefited?

22 A: I guess Fidelity Bank.

23 Q: Who got the loan; where did the loan proceeds go?

24 A: Oh, it went to Carolina Bank.

25 Q: And it went for what purpose?

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1 A: To pay off an unsecured note.

2 Q: Now who were the people in debt to Carolina Bank?

3 A: Bobby Lucas, Darren Lucas, and Jeff Cox.

4 Q: All right. Corporation wasn't indebted on that
5 note?

6 A: No, sir.

7 Q: Now are you aware of any other documents that you
8 executed on behalf of the corporation with
9 respect to this case?

10 A: I'm not sure what you're ---

11 Q: Okay. Now we looked at Plaintiff's Exhibit
12 Number 6 and Number 7. These are the two
13 resolutions. You've got Number 7 in front of you
14 and Number 6 I just handed you. Are you aware of
15 any other documents that exist with respect to
16 the corporation's involvement in this matter?

17 A: No, sir. I don't know.

18 Q: Of course we've got the mortgage. There's no
19 other resolutions to your knowledge?

20 A: I don't have no idea.

21 Q: Okay. And on the, I think it's Exhibit Number 6
22 there's another signature. Who is that?

23 A: Brooke E. Cox.

24 Q: And who is that?

25 A: My ex-wife.

1 Q: What was her position, if any, with the
2 corporation?

3 A: She was just a member in name only.

4 Q: Did she have a title or responsibilities with
5 respect to the corporation?

6 A: No, sir.

7 Q: Has she ever been given authority on behalf of
8 the corporation?

9 A: No, sir.

10 Q: Mr. Cox, when you signed those documents that you
11 admitted signing do you remember physically where
12 you were located?

13 A: You mean the documents from Fidelity?

14 Q: Yes.

15 A: In Ramseur, North Carolina.

16 Q: Ramseur?

17 A: Yes, sir, in the branch office there.

18 Q: For my information, what county is that?

19 A: Randolph.

20 Q: Randolph County, and do you recall anyone else
21 being present when you executed those documents?

22 A: I think Mr. Darren Lucas and Bobby Lucas were
23 there, as well.

24 Q: And do you have any recollection as to whether or
25 not they signed those documents or the note more

1 specifically at that same time?

2 A: I think they did, yes, sir.

3 MR. DIGGS: YOUR HONOR, THAT'S ALL I
4 HAVE.

5 THE COURT: ALL RIGHT. THANK YOU.

6 MR. DIGGS: THANK YOU.

7 THE COURT: ANY QUESTIONS ON RE-DIRECT?

8 MR. MOORE: YES, YOUR HONOR.

9 RE-DIRECT EXAMINATION

10 BY MR. MOORE:

11 Q: I'm going to hand you a document and ask you if
12 you can identify that document for me.

13 A: It's a settlement statement.

14 Q: For what?

15 A: For a loan to Cox Investment Group.

16 Q: And anybody else?

17 A: It's got handwritten, "Darren R. Lucas, Jeffrey
18 E. Cox, Bobby E. Lucas."

19 Q: And is this the transaction that we're referring
20 to in Plaintiff's Exhibit Number 1, the
21 promissory note for \$860,000?

22 A: The dates are the same, the amounts are the same.

23 MR. MOORE: YOUR HONOR, WE OFFER THIS
24 INTO EVIDENCE AS
25 PLAINTIFF'S EXHIBIT NUMBER

8.

MR. DIGGS:

NO OBJECTION, YOUR HONOR.

THE COURT:

ALL RIGHT. PLAINTIFF'S 8

SO ADMITTED.

PLAINTIFF'S EXHIBIT NUMBER 8

ADMITTED INTO EVIDENCE

Q: I hand you Exhibit Number 8. It's just been marked into the record. Did you sign that document?

A: Yes, sir.

Q: In fact, you signed it twice, didn't you?

A: Yes, sir.

Q: One time you signed it in your individual capacity and in your individual name; is that correct?

A: Yes, sir.

Q: And another time you signed it how?

A: It says, "Jeffrey E. Cox," and it's handwritten, "Managing Member."

Q: All right. And up at the top you made reference to some things that were written in. Do you see that?

A: Yes, sir.

Q: What was written in?

A: Just got the three names.

1 Q: The three individual names?

2 A: Yes, sir.

3 Q: Including your name?

4 A: Yes, sir.

5 Q: And there's some initials off to the right?

6 A: Yes, sir.

7 Q: Are your initials included in that?

8 A: Yes.

9 Q: By putting your initials there were you
10 acknowledging that this had been written in?

11 A: I don't know.

12 Q: Did they ask you to put your initials there?

13 A: I don't know.

14 Q: You don't remember?

15 A: No, sir.

16 Q: Do you remember signing this document?

17 A: I mean, that's my signature. I don't have any
18 specific recollection of signing it.

19 Q: And when you signed this document, you would have
20 reviewed it to make sure the information
21 contained in this document was correct, right?

22 A: That would be typical, yes, sir.

23 Q: All right. So as far as you know, when you
24 signed this you reviewed it and you were signing
25 it saying the information contained in this

1 document is accurate?

2 A: Yes, sir.

3 Q: I'm going to hand you another document and ask
4 you to identify that for The Court please.

5 A: It says Disbursement Request and Authorization.

6 Q: Okay. And that's your signature at the bottom?

7 A: Yes, sir.

8 MR. MOORE: YOUR HONOR, WE'D OFFER THIS
9 INTO EVIDENCE AS
10 PLAINTIFF'S EXHIBIT NUMBER
11 9.

12 MR. DIGGS: YOUR HONOR, WE DON'T HAVE
13 AN OBJECTION TO THE
14 DOCUMENT ITSELF, BUT I WANT
15 TO OBJECT TO THE RELEVANCE.
16 THE COURT: WHAT IS PLAINTIFF'S 9?

17 MR. MOORE: YOUR HONOR, PLAINTIFF'S
18 NUMBER 9 IS A DISBURSEMENT
19 REQUEST AND AUTHORIZATION
20 THAT PURPORTS TO BE SIGNED
21 BY THE WITNESS AND TWO
22 OTHERS INDICATING THE
23 DISBURSEMENTS OF LOAN AND
24 SUPPLEMENTS THE DOCUMENT WE
25 JUST PUT INTO THE RECORD.

1 THE COURT: ALL RIGHT. I'LL ALLOW IT.
2 PLAINTIFF'S 9 SO ADMITTED.
3 PLAINTIFF'S EXHIBIT NUMBER 9
4 ADMITTED INTO EVIDENCE
5 Q: You testified that's your signature at the bottom
6 of Plaintiff's Exhibit Number 9?
7 A: Yes, sir.
8 Q: And by signing that you are attesting that the
9 information contained in this document was
10 accurate, correct?
11 A: I would assume so, I mean, I just signed it
12 because the bank asked me to sign it.
13 MR. MOORE: NO FURTHER QUESTIONS, YOUR
14 HONOR.
15 THE COURT: ALL RIGHT. ANYTHING ON RE-
16 CROSS?
17 MR. DIGGS: NO.
18 THE COURT: ALL RIGHT. YOU MAY STEP
19 DOWN, MR. COX.
20 MS. GRUNTHAL: YOUR HONOR, THE PLAINTIFF
21 RESTS OUR CASE.
22 THE COURT: ALL RIGHT. THANK YOU.
23 MR. DIGGS: YOUR HONOR, I HAVE A MOTION
24 TO DISMISS PLAINTIFF'S CASE
25 BECAUSE OF A FAILURE TO

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PROVE AT THIS POINT. THE
WITNESS -- WHAT THEY SOUGHT
TO DO IN AN AMENDED
COMPLAINT WAS TO REFORM A
MORTGAGE. THEY BROUGHT AN
INDIVIDUAL DOWN WHO DOESN'T
HAVE INFORMATION ABOUT THE
ALLEGED ERROR. IN FACT, HE
DIDN'T EVEN TESTIFY ABOUT
THAT UNTIL I ASKED HIM. HE
DOESN'T KNOW WHEN THE ERROR
OCCURRED, WHO MADE IT, BUT
HE DOES KNOW ALLEGEDLY IT
WAS DISCOVERED BEFORE THE
EXECUTION OF THE FIRST
EXTENSION. NO ACTION WAS
TAKEN BY THE BANK TO MAKE
ANY CORRECTIVE ACTIONS WITH
RESPECT TO THE MORTGAGE.
SO WITH RESPECT TO
REFORMING THE MORTGAGE
BASED ON THE SCRIVENER'S
ERROR, I WOULD SUBMIT THAT
THE EVIDENCE FAILS. IT'S
NOT UP TO THE DEFENDANTS TO

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COURT. WHAT HAS BEEN
OFFERED TO THE COURT IS
THAT THAT'S WHAT THE BANK
INTENDED AND WHAT MR. COX
TESTIFIED IS THAT'S WHAT HE
INTENDED. SO CLEARLY WE
HAVE SHOWN WHAT IS REQUIRED
IN ORDER TO GET A
REFORMATION. WE'VE SHOWN
MUTUAL MISTAKE, WE'VE SHOWN
AN ERROR IN THE DOCUMENT,
AND WE'RE MERELY ASKING THE
DOCUMENTS REFLECT THE
INTENTION OF THE PARTIES.
AND THAT WAS THAT THESE
THREE INDIVIDUALS WOULD
BORROW MONEY FROM THE BANK
AND THE LLC WOULD GIVE A
MORTGAGE ON THE PROPERTY.
NOT ONLY DOES THE MORTGAGE
SUGGEST THAT, BUT IF YOU
LOOK AT THE LLC DOCUMENTS,
YOU LOOK AT THE SETTLEMENT
STATEMENT, THEY ALL REFLECT
THAT THIS IS WHAT THE

1 PARTIES INTENDED. WE'RE
2 MERELY ASKING THIS COURT OF
3 EQUITY TO DO WHAT THE
4 PARTIES INTENDED, AND THAT
5 IS TO ENFORCE A MORTGAGE
6 THAT THEY GAVE ON THEIR
7 PIECE OF PROPERTY. THAT'S
8 IT, AND I THINK WE DO HAVE
9 A CAUSE OF ACTION THAT'S
10 BEEN ASSERTED. THE
11 EVIDENCE AS I HAVE STATED
12 AND I THINK THEY SUPPORT
13 OUR REFORMATION OF
14 MORTGAGE.

15 THE COURT:

OKAY. MR. DIGGS, I'M GOING
16 TO DENY YOUR MOTION AT THIS
17 TIME ON THE REFORMATION
18 CAUSE OF ACTION. LET ME
19 HEAR YOUR SECOND.

20 MR. DIGGS:

YOUR HONOR, WITH RESPECT TO
21 THE SECOND CAUSE OF ACTION,
22 FIRST CAUSE IS TO REFORM
23 THE MORTGAGE, THE SECOND IS
24 THE FORECLOSURE OF THE
25 MORTGAGE. BEING IN EQUITY,

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THE TESTIMONY SHOWS THAT
THE BORROWERS IN THIS CASE
WERE INDIVIDUALS, THREE
INDIVIDUAL DEFENDANTS. THE
MONEY THAT WAS USED WENT TO
PAY OFF A PRIOR LOAN,
WASN'T PURCHASE MONEY, IT
WAS A PAYMENT THAT WAS MADE
ON A PRE-EXISTING DEBT. IF
THE COURT GRANTS, AND I
UNDERSTAND THE COURT HASN'T
RULED ON THE SPECIFIC ISSUE
OF THE REFORMATION AT THIS
POINT, BUT IF THE COURT
REFUSES TO ALLOW THE
REFORMATION, THEN OF COURSE
THE FORECLOSURE WOULD FAIL
BECAUSE OF A LACK OF
CONSIDERATION. THE
MORTGAGE IS UNENFORCEABLE
BECAUSE OF LACK OF
CONSIDERATION BETWEEN THE
LENDER AND COX INVESTMENT
GROUP, EXCUSE ME, COX
INVESTMENT GROUP, LLC.

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SECOND, IN THE DOCUMENTS
THAT HAVE BEEN PLACED INTO
EVIDENCE, WHICH WEREN'T
PLEAD IN THE TERMS OF
REFORM, EXHIBIT NUMBER 7 IS
-- LET ME MAKE SURE.
EXHIBIT NUMBER 6 IS THE
CORPORATE RESOLUTION SIGNED
BY AN INDIVIDUAL. IT
WASN'T SIGNED AS MEMBER.
THERE'S A DEFECT IN THAT
DOCUMENT AT LEAST IN TERMS
OF BEING CONSISTENT WITH
THE PLAINTIFF'S THEORY IN
THIS CASE. EXHIBIT 7 SHOWS
ALSO A DEFECT WITH RESPECT
TO THIS INVOLVEMENT WITH
THIS PLAINTIFF'S CASE
AGAINST THESE DEFENDANTS.
EXHIBIT NUMBER 7 TALKS
ABOUT THE PURCHASE OR
ACQUISITION OF THE
MORTGAGED PROPERTY, AND
THAT'S A COMPLETELY
DIFFERENT TRANSACTION. YOU

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HEARD TESTIMONY AND IT
WASN'T DISPUTED. THAT
DOCUMENT DRAWN UP BY THE
BANK OR SOMEONE ON BEHALF
OF THE BANK, BY SOMEONE ON
BEHALF OF THE BANK, SO WHAT
WE REALLY HAVE IN THE
PLAINTIFF'S CASE IS
CONFUSION ABOUT WHAT ALL OF
THESE DOCUMENTS WERE
INTENDED TO DO. NOW WE CAN
ASSUME THAT COUNSEL KNOWS
WHAT WAS INTENDED, THE TWO
ATTORNEYS HERE WHO
PARTICIPATED IN THIS ACTION
ON BEHALF OF THE BANK, BUT
THEY'RE NOT WITNESSES.
THEY DON'T KNOW. BASED ON
THE WITNESS' TESTIMONY IN
THIS CASE WE DON'T KNOW WHO
DID WHAT ON BEHALF OF WHOM.
AND SO BECAUSE OF THAT
THERE'S JUST TOO MANY
QUESTIONS, I WOULD SUBMIT,
TO ALLOW THE BANK TO

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FORECLOSE ON THIS PROPERTY
WITH THOSE KINDS OF DEFECTS
THAT EXISTED FOR A YEAR AND
A HALF OR MORE IN THIS
ACTION BEFORE -- OR MAYBE
UP TO A YEAR, IT EXISTED
FOR A YEAR. FROM THE TIME
THE ORIGINAL NOTE WAS
EXECUTED TO THE TIME IT WAS
FORECLOSED OR SUIT WAS
BROUGHT. THEY EVEN HAD TO
AMEND THEIR COMPLAINT, SO
IF IT WAS A CONSISTENT
THEORY THAT THEY WANT TO
ASSERT BEFORE THE COURT
TODAY I WOULD SUBMIT THAT
THE FORECLOSURE SHOULD BE
DENIED BECAUSE OF THE
DEFECTS WITH RESPECT TO THE
MORTGAGE, THE PERSON WHO
GRANTED THE MORTGAGE IN
THIS CASE, PERSON WHO OWNED
THE MORTGAGED PROPERTY, AND
THE INDIVIDUAL PERSONS WHO
RECEIVED PROCEEDS OF THE

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LOAN THAT'S BEING MADE AT
ISSUE IN THIS CASE. NOW I
HAD ANOTHER THOUGHT, YOUR
HONOR. IT SLIPPED MY MIND,
BUT I'LL COME BACK TO IT IN
JUST A MINUTE.

THE COURT:

OKAY. ALL RIGHT. MR.
MOORE?

MR. DIGGS:

IF COUNSEL HAS ANY
RESPONSE, BUT I DO WANT TO
COME BACK.

MR. MOORE:

YES, YOUR HONOR, IF THERE
WAS ANY QUESTION AS TO WHAT
WAS INTENDED IN THIS CASE
IT WAS CLARIFIED BY THE ONE
QUESTION I ASKED MR. COX.
AND THAT WAS, "DID YOU
INTEND TO GET THIS MORTGAGE
IN CONJUNCTION WITH THIS
NOTE?" AND HE'S TESTIFIED
THAT HE DID. I ASKED HIM
IF THERE WERE ANY OTHER
TRANSACTIONS AT THAT POINT
IN TIME BETWEEN THE BANK,
THE PLAINTIFF IN THIS

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ACTION, AND THE LLC. AND
HE SAID NOT THAT HE KNEW.
HE TESTIFIED HE WAS A
MANAGING MEMBER. IT'S
CLEAR WHAT HAPPENED HERE.
IT'S CLEAR THAT THERE WAS A
HYPOTHECATION. THE LLC WAS
GIVING A MORTGAGE TO SECURE
A DEBT BY THREE
INDIVIDUALS, AND THE ONLY
THING THE DEFENDANT HAS
FOUND TO DIG HIS HEELS INTO
IS A SCRIVENER'S ERROR, AND
THAT SCRIVENER'S ERROR IS
THE DEFINITION OF BORROWER
IN A FORM DOCUMENT. AND IT
MERELY SAYS THE BORROWER
BORROWED MONEY. WELL,
ACTUALLY THE BORROWER HERE
DIDN'T BORROW MONEY AS
DEFINED IN THAT MORTGAGE;
THREE INDIVIDUALS BORROWED
MONEY, AND THAT'S THE THING
THAT WE WANT TO CORRECT.
WE WANT TO CORRECT IT SO

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IT'S CONSISTENT WITH WHAT
MR. COX TESTIFIED TO.
INSOFAR AS NO CORRECTION
BEING DONE TO THE MORTGAGE,
THERE ARE TWO
MODIFICATIONS. THERE WAS
NO MODIFICATION FOR THE
MORTGAGE. THE MORTGAGE
ITSELF SECURES EXTENSIONS,
MODIFICATIONS, OR WHATEVER
ELSE. SO THERE WAS NO NEED
TO MODIFY THE MORTGAGE. WE
INTEND THAT WE HAVE A VALID
MORTGAGE THAT WAS SIGNED BY
THE LLC, AUTHORIZED BY THE
LLC BY ITS OWN DOCUMENTS,
AND WE JUST GAVE THEM THE
MONEY. WE PERFORMED THE
TRANSACTION. WE'RE ASKING
THE COURT TO PERFORM THE
TRANSACTION THAT'S BEEN
TESTIFIED OR TO ENFORCE THE
TRANSACTION THAT'S BEEN
TESTIFIED HERE TODAY. NOW
INSOFAR AS EXHIBIT NUMBER

1 6, MR. COX NOT SIGNING IN
2 HIS REPRESENTATIVE
3 CAPACITY, IF YOU LOOK AT
4 EXHIBIT NUMBER 6 IT SAYS,
5 "THE PEOPLE THAT ARE
6 SIGNING BELOW ARE MEMBERS
7 OF THE LLC." SO I DON'T
8 THINK THEY NEED TO SAY,
9 "I'M A MEMBER OF THE LLC,"
10 AND THEN SIGN AT THE
11 BOTTOM, "LLC MEMBER." THAT
12 DOCUMENT ITSELF SAYS WHAT
13 IT SAYS. EVEN WITHOUT 6
14 YOU HAVE EXHIBIT NUMBER 7
15 WHICH SPECIFICALLY
16 AUTHORIZES THIS
17 TRANSACTION. THE BANK WAS
18 VERY CAREFUL TO HAVE THIS
19 LOAN DOCUMENT AS IT SHOULD
20 BE. THE ONLY THING THAT I
21 WOULD THINK THAT WAS AN
22 ERROR, WOULD BE A
23 SCRIVENER'S ERROR, MISTAKE,
24 WAS THE DEFINITION OF WHO
25 THE BORROWER WAS FOR THE

1 MORTGAGE. THAT'S THE ONLY
2 THING THEY'RE COMPLAINING
3 ABOUT. EVERYTHING ELSE IS
4 A NON-ISSUE. WE THINK THAT
5 THE COURT SHOULD DENY THE
6 MOTION FOR, I GUESS IT
7 WOULD BE AN INVOLUNTARY
8 NON-SUIT IN THIS CASE AT
9 THIS POINT IN TIME BECAUSE
10 WE THINK THE EVIDENCE IS IN
11 FRONT OF THE COURT THAT
12 PROVES THE MORTGAGE, PROVES
13 A DEBT THAT WAS SECURED BY
14 THAT MORTGAGE, SHOWS A
15 DEFAULT, SHOWS NON-PAYMENT,
16 SHOWS DEMAND. AND WE WANT
17 TO BE PAID. THAT'S WHAT
18 WE'RE HERE ABOUT. WE WANT
19 TO EITHER BE PAID, AND IF
20 THEY CAN'T PAY US, WE WANT
21 TO BE ABLE TO FORECLOSE THE
22 MORTGAGE THAT THEY ADMIT
23 THEY GAVE US IN ORDER TO
24 SATISFY THAT DEBT.

25 THE COURT:

ALL RIGHT. THANK YOU. DID

1 YOU THINK OF YOUR OTHER
2 THOUGHT, MR. DIGGS, ---
3 MR. DIGGS: YES, YOUR HONOR.
4 THE COURT: --- ON YOUR SECOND CAUSE OF
5 ACTION?
6 MR. DIGGS: HAD TO DO WITH THE
7 DEFICIENCY JUDGMENT. I
8 THINK I'M GOING TO ADDRESS
9 THAT AT THIS POINT TO THE
10 COURT.
11 THE COURT: SO IT DOESN'T HAVE ANYTHING
12 TO DO WITH YOUR SECOND
13 CAUSE OF ACTION AT THIS
14 POINT?
15 MR. DIGGS: IT DOESN'T HAVE ANYTHING TO
16 DO SPECIFICALLY WITH THE
17 SECOND CAUSE OF ACTION.
18 THE COURT: OKAY. THEN I'M GOING TO
19 DENY YOUR MOTION TO DISMISS
20 AS TO THE SECOND CAUSE OF
21 ACTION. AND LET ME HEAR
22 FROM YOU AS TO THE
23 DEFICIENCY JUDGMENT.
24 MR. DIGGS: YOUR HONOR, WITH RESPECT TO
25 THAT ISSUE, DEFICIENCY

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JUDGMENT'S NOT PROPERLY
PLEAD IF THAT'S THE LEAD
PROCEEDING AT THIS TIME.
WHAT THEY'RE SEEKING TO DO
IS GET A DEFICIENCY AGAINST
THESE THREE INDIVIDUAL
DEFENDANTS ON THE
FORECLOSURE OF THE MORTGAGE
THAT WAS WITH RESPECT TO
PROPERTY THAT THEY DON'T
OWN. SO IF THEY WANTED TO
GO IN THE DIRECTION OF
FORECLOSING THE MORTGAGE
THAT'S ON PROPERTY OWNED BY
COX INVESTMENT GROUP, LLC
AND THEN GET ADDITIONAL
MONIES FROM THE DEFENDANTS
ON THE NOTE, THEY SHOULD
HAVE PROCEEDED WITH THE
NOTE ITSELF, WHICH THEY
DIDN'T DO. SO BASED ON
THAT, I WOULD ASK THE COURT
TO ENTER A RULING AT THIS
POINT THAT A DEFICIENCY
JUDGMENT IS NOT APPROPRIATE

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THE COURT:

MR. MOORE:

IN THIS CASE AND ENTERTAIN
ONLY MERITS OF THE QUESTION
OF THE REFORMATION.

MR. MOORE?

YES, YOUR HONOR, MAY IT
PLEASE THE COURT? LOOK AT
THE PRAYER CONTAINED IN THE
AMENDED COMPLAINT, IT'S
CLEAR THAT WE'RE REQUESTING
THE COURT DETERMINE THE
AMOUNT THAT'S DUE ON THE
NOTE. AND AS IN ALL
FORECLOSURES THE COURT
DETERMINES WHAT THE AMOUNT
IS ON THE NOTE, JUDGMENT IS
ENTERED IN THE PLAINTIFF'S
FAVOR OF THAT AMOUNT, AND
THEN THE PROPERTY'S SOLD.
PROCEEDS OF THE SALE ARE
USED TO SATISFY THE DEBT.
ANYTHING THAT'S REMAINING
AFTER THE APPLICATION
REMAINS OR GOES TO THE
PEOPLE WHO SIGNED THAT
NOTE. I DON'T UNDERSTAND

Prestige Court Reporting, Inc.

1 THE DEFICIENCIES TO WHICH
2 DEFENDANT'S COUNSEL REFERS
3 WHEN HE SAID WE DIDN'T ASK
4 BECAUSE I THINK WE CLEARLY
5 ASKED THAT A JUDGMENT BE
6 RENDERED AGAINST THE
7 DEFENDANTS JOINTLY AND
8 SEVERELY FOR THE AMOUNT DUE
9 ON THE NOTE.

10 MR. DIGGS:

11 YOUR HONOR, I'M NOT TALKING
12 ABOUT WHEN HE ASKED FOR IN
13 THE PRAYER. THE PRAYER IS
14 BASED ON WHAT THE FACTUAL
15 ALLEGATIONS ARE IN THE
16 COMPLAINT. THE COMPLAINT
17 SEEKS TO REFORM THE
18 MORTGAGE AND THEN FORECLOSE
19 ON IT. IT DOESN'T SAY
20 ANYTHING ABOUT SEEKING ANY
21 KIND OF JUDGMENT, PERSONAL
22 JUDGMENT AGAINST OTHER
23 PEOPLE THAT ARE NOT LINKED
24 TO THE MORTGAGE. SO THAT'S
25 THE BASIS OF THE MOTION.
ORDINARILY PLAINTIFF'S

1 COUNSEL WOULD BE CORRECT
2 BECAUSE WE HAVE A MORTGAGE
3 THAT'S BEEN GIVEN BY THE
4 BORROWERS WHO BENEFIT FROM
5 THE PROCEEDS OF THE LOAN,
6 FORECLOSE ON THE MORTGAGE,
7 MONIES LEFT OVER, YOU'D GET
8 A JUDGMENT AGAINST THOSE
9 SAME PEOPLE. WE'VE GOT
10 CONFLICTING IDENTITIES IN
11 THIS SITUATION. THAT
12 PROCEDURE THAT THEY
13 PLAINTIFFS ARE TRYING TO
14 INVOKE AT THIS POINT IS
15 INAPPROPRIATE FOR THIS
16 PARTICULAR FACTUAL
17 SCENARIO. THEY SHOULD HAVE
18 PLEAD FOR DAMAGES ON THE
19 NOTE, AND THEY DIDN'T DO
20 IT.

21 MR. MOORE:

22 YOUR HONOR, PARAGRAPH TEN,
23 11, AND 12 ALL REFER TO THE
24 NOTE AND MODIFICATION, SET
25 FORTH TERMS IN BOTH
MODIFICATIONS. PARAGRAPH

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20 SAYS THAT THEY ARE IN
DEFAULT. PARAGRAPH 21 SAYS
THAT WE'VE BEEN FORCED TO
PROCEED FORECLOSURE, AND I
DON'T KNOW WHAT ELSE WE
COULD HAVE ASKED FOR. WE
PLEAD THAT THEY SIGNED THE
NOTE. THEY PLEAD THEY
HAVEN'T PAID FOR THE NOTE
DESPITE DEMAND, AND WE'RE
ASKING THE COURT FOR A
JUDGMENT ON THE AMOUNT
THAT'S DUE ON THE DEBT.
THERE IS A FIRST CAUSE OF
ACTION FOR THE REFORMATION.
THE SECOND CAUSE OF ACTION
IS TO FORECLOSE THAT NOTE
AND MORTGAGE.

MR. DIGGS:

HE'S GOT TO ESTABLISH, YOUR
HONOR, YOU'RE LOOKING AT

THE COURT:

I'VE GOT IT.

MR. DIGGS:

I'M NOT TRYING TO JUMP IN.
HE'S GOT TO ESTABLISH SOME
JUSTIFICATION FOR RECORDING

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IN A MORTGAGE AND
FORECLOSING ON IT. AND
THAT'S WHAT HE'S DONE IN
THESE PARAGRAPHS, AS WELL.
HE DIDN'T SET OUT SPECIFIC
CAUSES OF ACTIONS, SEEKING
JUDGMENT ON THE NOTE. THEY
CAN'T PIGGYBACK ON THE BACK
OF THE FORECLOSURE JUDGMENT
AGAINST OTHER PEOPLE THAT
AREN'T ASSOCIATED WITH OR
CONNECTED WITH THE
MORTGAGE. THAT'S -- SO OUR
ARGUMENT, I WOULD SUBMIT,
IS CONSISTENT; HIS IS NOT.
AND PARAGRAPH 24 SAYS, "THE
PLAINTIFF IS INFORMED TO
BELIEVE IT IS ENTITLED TO
AN TO DETERMINE THE AMOUNT
DUE UNDER THE NOTE, PLUS AN
AWARD OF COLLECTION,
EXPENSES, INCLUDING
REASONABLE ATTORNEY'S FEES
AND COSTS."
WHICH IS ASSOCIATED WITH

MR. MOORE:

MR. DIGGS:

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THE COURT:

THE FORECLOSURE.
WELL, MR. DIGGS, WHEN WE
HAVE A FORECLOSURE OF A
MORTGAGE, WE DON'T USUALLY
HAVE TWO CAUSES OF ACTION,
A BREACH OF THE NOTE AS ONE
CAUSE OF ACTION AND THEN A
FORECLOSURE OF THE MORTGAGE
AS THE SECOND CAUSE OF
ACTION. I THINK THAT'S
WHAT YOU'RE BASICALLY
SAYING. THERE SHOULD BE

MR. DIGGS:

IT IS, AND I'M AWARE OF THE
STATUTE, YOUR HONOR. THERE
IS A STATUTE SOMEWHERE THAT
I'VE SEEN SOMEWHERE THAT
ALLOWS THAT TO BE THE CASE
IN SOME SITUATIONS WHICH IS
NOT PRESENT IN THIS CASE.
IT WOULD BE INAPPLICABLE IN
THE FORMAL RULES AND THE
PLEADING WOULD BE REQUIRED.
NOW THIS IS NOT SOMETHING
THAT I COULD HAVE OBJECTED

1 TO OR SHOULD HAVE OBJECTED
2 TO EARLIER IN THE RULES OF
3 THE PLEADING BECAUSE IT
4 DIDN'T REALLY UNFOLD SIMPLY
5 BECAUSE IN A PRAYER I CAN
6 ASK FOR THE MOON. I CAN
7 ASK FOR MANY, MANY YEARS
8 AND MAY STILL BE THE CASE.
9 AND IN THIS COUNTY WHEN YOU
10 PRAY FOR RELIEF YOU ASK FOR
11 ATTORNEY'S FEES. IN MANY,
12 MANY CASES THAT'S DONE EVEN
13 THOUGH IT'S NOT PERMITTED
14 UNDER THE LAW. NOTHING
15 MORE THAN THAT HAPPENED
16 HERE. IT'S ASKING FOR A
17 DEFICIENCY, BUT IT'S NOT
18 RIGHT, AND I WOULD SUBMIT
19 IT SHOULD BE DENIED.

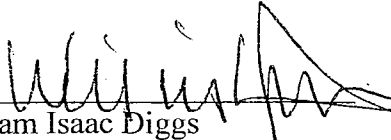
20 MR. MOORE:

21 YOUR HONOR, WE WOULD
22 SUGGEST THE DEFENSE IS NOT
23 PROPERLY PLEAD. THIS IS A
24 FIRST THAT WE'VE HEARD OF
25 THIS DEFENSE, AND WE'D ASK
FOR THE COURT'S PERMISSION.

1 IF THE COURT BELIEVES HIS
2 ARGUMENT TO BE CORRECT,
3 WE'D ASK THE COURT'S
4 PERMISSION TO AMEND OUR
5 COMPLAINT AT THIS POINT IN
6 TIME TO INCLUDE AN ACTION
7 FOR THE AMOUNT THAT'S DUE
8 ON THE NOTE. THAT'S
9 CLEARLY WHAT'S PLEAD, MAYBE
10 IT'S NOT BROKEN OUT IN
11 SEPARATE CAUSES OF ACTION.
12 IF HE HAD A CONCERN OR
13 PROBLEM WITH THAT HE SHOULD
14 HAVE PLEAD IT IN HIS
15 ANSWER.
16 THE COURT: IT'S NOT NECESSARY. I'M
17 GOING TO DENY THAT MOTION.
18 I THINK IT'S PROPERLY
19 PLEAD.
20 MR. DIGGS: ALL RIGHT. I JUST WANT TO
21 -- MAY I MAKE ONE STATEMENT
22 FOR THE RECORD?
23 THE COURT: YES, SIR, YOU MAY.
24 MR. DIGGS: IN OUR CONVERSATIONS WITH
25 PLAINTIFF'S COUNSEL IT

CERTIFICATE OF COUNSEL

Pursuant to S.C.A.C.R. 210, counsel certifies that the foregoing Record on Appeal contains all material proposed to be included by any of the parties and not any other material.


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ATTORNEY FOR THE APPELLANT

This 30th day of January, 2012
Myrtle Beach, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master In Equity
Case No. 2009-CP-26-5479

Fidelity Bank,

Respondent,

v.

Cox Investment Group, LLC, Jeffrey E. Cox, Bobby E.
Lucas, Darren K. Lucas, and the Margate Tower At
Kingston Plantation Property Owners' Association, Inc.,

Defendants

Of Whom

Cox Investment Group, LLC, Jeffrey E. Cox, Bobby E.
Lucas, and Darren K. Lucas are

Appellants

FINAL BRIEF OF APPELLANTS

William Isaac Diggs
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ATTORNEY FOR APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. Did Respondent's pleading state sufficient facts to entitle it to a deficiency judgment?
- II. Did the Respondent's pleading state sufficient facts to establish the right to the legal remedy of third party deficiency judgment when the pleading sought only equitable relief of mortgage reformation and foreclosure of the reformed mortgage of which the third parties were not mortgagors?

Sub Issue: Did the trial court erroneously rely on S.C. Code Ann § 29-3-660 in this mortgage reformation case to allow for deficiency judgment?

- III. Was an action for reformation of the mortgage sufficiently pled?

STATEMENT OF THE CASE

Respondent filed this action on June 2, 2009, seeking to foreclose a mortgage. In its prayer for relief Respondent requested a deficiency judgment against Appellants. An answer was filed on July 6, 2009, by Cox Investment Group, LLC; Jeffrey E. Cox; and Bobby E. Lucas. After service had been effectuated on the third individual defendant, Darren K. Lucas, he filed an answer on August 27, 2009. On October 7, 2009, an Order of Reference was filed following a motion by Respondent to amend its complaint. **R. 69.** The amendment sought to reform the mortgage and then to foreclose the mortgage. **R. 43.** The motion was granted. On December 22, 2009, an Answer to the Amended Complaint was prematurely filed by Appellants even though the amended complaint had not been actually filed. An answer was filed at this time in reliance on the pleading served with the motion. This answer contained five defenses but was supplanted by a subsequent filing.

On May 4, 2010, the Amended Summons and Complaint were filed and served. The body of this filing contained two causes of action. On May 11, 2010, after being served with the amended summons and complaint, an answer was filed by Appellants. This answer supplanted the prior answer and contained ten (10) defenses. **R. 53.** A merits hearing was held on June 16, 2011, before the Honorable Cynthia Graham Howe, Master In Equity for Horry County. After that hearing, with the consent of Judge Howe, the Appellants submitted a Memorandum In Support of Judgment for the Defendants. Respondent then submitted its Response thereto. On August 29, 2011, Judge Howe ruled in favor of Respondent. Her order was entered on September 12, 2011, and after service of same on Appellant's counsel, this timely appeal follows.

ARGUMENT I

The Respondent's pleading did not state sufficient facts to establish the right to the legal remedy of third party deficiency judgment when the pleading sought only equitable relief of mortgage reformation and foreclosure of the reformed mortgage of which the third parties were not mortgagors. (Questions I & II)

This is mainly an action to reform a mortgage and then to foreclose it. However, in its prayer for relief, Respondent requested a deficiency judgment in the event a sale of the mortgaged property failed to fully satisfy the debt obligation alleged to exist. Appellants argue that the pleading was deficient in that it failed to plead a legal cause of action on the note at issue in this case. Additionally, Appellants argue that the trial court committed error in its reliance on S.C. Code Ann § 29-3-660 because of the deficiency in the pleading. Lastly, Appellants argue that the pleading was insufficient to state a claim for reformation because it alleged a "scrivener's error" and then relied on an alleged mutual mistake in the trial of the case.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." U.S. Bank Trust Nat. Ass'n v. Bell, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009). In an appeal from an action in equity, tried by a judge alone, the reviewing court may find facts in accordance with its own view of the preponderance of the evidence." Id. "Whether a party is entitled to a jury trial is a question of law." Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "An appellate court may decide questions of law with no particular deference to the [circuit] court." Id. at 15, 690 S.E.2d at 772-73. Wachovia Bank v. Blackburn, Opinion No. 4874 (S.C.Ct.App. filed August 24, 2011).

Historical Background and Timeline

On September 26, 2007, a "Certificate of Managers of Limited Liability Company" was executed purportedly allowing Cox Investment Group, LLC to borrow money from time to time from plaintiff, ratifying documents previously executed relating to such transactions, and allowing the bank to rely upon the resolution until further notice. The certificate was signed by Jeffrey E. Cox and Brooke E. Cox in their individual capacities. **R. 72.**

October 3, 2007 a note (number xxxxxx2755) was executed by Bobby E. Lucas; Darren K. Lucas and Jeffrey E. Cox in favor of the Respondent in the amount of \$860,000.00.¹ **R. 74.** The maturity of this note was April 3, 2008, thereby creating a six month term. The evidence at trial showed that this money was not used to purchase the property which was mortgaged in Myrtle Beach by Cox Investment Group, LLC, but was used to pay off a different financial obligation. There was no mortgage on the subject property at that time. A corporate resolution dated October 3, 2007, not drafted by the corporate defendant or either of its members, was adopted which stated

Resolved, that the said Corporation be and it is hereby authorized and directed to refinance of [sic] Unit 1408 of Margate Towers@ Kingston Plantation, and that Jeff Cox as Managing Member of said Corporation, has the power to sign, been [sic] shall be empowered to sign all documents relating to said purchase.

This resolution was signed by *Jeffrey E. Cox, Managing Member*. **R. 73.**

¹ This was loan number xxxxxx2755 as shown on the face of the exhibit note introduced at trial by plaintiff's counsel.

A mortgage was executed this date naming Cox Investments [sic] Group, Inc.² as the borrower. This mortgage was signed by Jeffrey E. Cox Managing Member and witnessed by a North Carolina Notary. The mortgage stated that the borrower was Cox Investment Group, LLC. **R. 32, lines 6 – 9.** On April 9th, 2008, a Note Modification Agreement was executed which extended the maturity date of the note to October 9, 2008. The three individual Appellants executed this note modification agreement but the corporate defendant did not. On October 9th, 2008, a second Note Modification Agreement was executed by the individual Appellants. The maturity date was extended to April 9th, 2009. Again, the corporate defendant did not sign the agreement.

Notwithstanding this course of dealing which had been established between the parties, the Respondent refused to accept additional note modification agreements even though the defendants were ready, willing and able to continue to pay required interest payments and had indeed asked for permission to do so. The plaintiff offered no reason at trial as to why it made the decision it did in this case. In fact, at trial plaintiff chose to present a single bank employee who knew only what he had read from documents in the bank's file. On June 2, 2009, the original civil action was filed. This complaint sought only to foreclose the mortgage and in the prayer for relief Respondent requested a deficiency judgment against the Appellants. Appellants filed answers containing multiple defenses.

On October 7, 2009, an Order of Reference was filed following a motion to amend the complaint. This motion was granted. On December 22, 2009, an Answer to the

² While this is not the correct name of the corporate defendant, this error is not an issue in this appeal. The correct name of the corporate defendant is, "Cox *Investment* Group, LLC," not Cox *Investments* Group.

Amended Complaint containing the defenses was filed by the Appellants even though the amended complaint had not actually been filed and served.³

On January 21, 2010, a Notice of Appearance as co-counsel for Plaintiff was mailed to the Court and all parties. Co-counsel's appearance indicated that he was to work with plaintiff's original counsel of record. Thereafter, on May 4, 2010, the Amended Summons and Complaint were filed by original counsel and co-counsel and served. **ROA. 43.** The body of this filing contained two causes of action. It sought reformation of the mortgage and foreclosure of the mortgage. The *prayer for relief* asked for a deficiency judgment but there was still no cause of action in the complaint on the note itself seeking a money judgment. The cause of action which seeks to reform the mortgage does reference the note but does so merely as an explanation and justification for the mortgage reformation. The complaint itself actually alleges that a scrivener's error had occurred. **ROA. 46.**

The second cause of action then alleges a default under the terms of the note and *seeks foreclosure* of the mortgage. On May 11, 2010, after actually being served with the amended summons and complaint, an answer was filed by the Appellants. This responsive pleading contained 10 defenses.⁴ **ROA 53.** Thereafter, on April 6, 2011, an order was filed which relieved plaintiff's original counsel and substituted counsel who appeared at the trial of this matter along with previously noticed co-counsel.

³ Plaintiff's counsel had attached a copy of a proposed amended complaint to the motion for reference and the motion to amend the complaint. It is to that filing which defendants initially filed a responsive pleading prior to actual service of the court authorized amended complaint. The Court's file shows that the Order permitting amendment of the complaint was filed on April 28, 2010. As stated, Appellants' answer was filed on May 11, 2011.

⁴ Some of those defenses were abandoned at trial.

Sufficiency of Pleading and Deficiency Judgment

Defendants initially asserted that Plaintiff's complaint failed to state facts sufficient to constitute a cause of action pursuant to S.C.R.C.P. 12(b)(6). **ROA 53.**

"Under Rule 12(b)(6), SCRCPP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then to grant a motion to dismiss for failure to state a claim is improper. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006). An action to recover on a promissory note is an action at law. Wayne Dalton Corp. v. Acme Doors, Inc., 302 S.C. 93, 95, 394 S.E.2d 5, 6 (Ct.App. 1990); Chambers v. Pingree, 351 S.C. 442, 570 S.E.2d 528 (Ct.App. 2002). However, an action to foreclose a real estate mortgage comes within the equitable jurisdiction of the court. MI Co., Ltd. v. McLean, 325 S.C. 616, 482 S.E.2d 597, 601 (Ct.App. 1997). Under Rule 38 (a), SCRCPP, issues of fact in an action for money only must be tried by a jury unless a jury trial is waived. In determining whether the case is legal or equitable, some South Carolina cases have applied the "main purpose rule." If a plaintiff has prayed for money damages in addition to equitable relief, characterization of the action as equitable or legal depends on the plaintiff's "main purpose" in bringing the action. Baughman v. AT&T, 289 S.C. 127 [298 S.C. 127], 129, 378 S.E.2d 599, 600 (1989). However, numerous cases have held that where legal and equitable issues and rights are asserted in the same complaint, legal issues are for determination by a jury and

equitable issues for the judge. Airfare, Inc. v. Greenville Airport Comm., 249 S.C. 265, 269, 153 S.E.2d 846, 848 (1967); Winter v. U.S. Fidelity & Guaranty Co., 240 S.C. 561, 573, 126 S.E.2d 724, 730 (1962).”⁵ Appellants reference the right to jury trial to emphasize the existence of both legal issues and equitable issues in this case.

In Respondent’s case, there are *two* main equitable purposes before it reaches the legal issue. Respondent seeks (1) to reform the mortgage, and then, (2) to foreclose it. While S.C. Code Ann § 29-3-660 allows a court to render a deficiency judgment against third parties who are deemed to be obligors with regard to the mortgaged property, that statute is silent regarding actions to reform a mortgage.⁶ Here, Respondent has jumbled and co-mingled its causes of action. Respondent has failed to allege that the individual defendants are persons who secured the mortgage debt with a prior covenant or obligation as contemplated by statute § 29-3-660. We submit that in a mortgage reformation action a plaintiff cannot simultaneously seek a reforming of the mortgage in order to establish a covenant by third parties regarding the mortgaged property and a deficiency judgment. The statute does not allow for such a bootstrapping as is attempted here. Respondent sought to reform its mortgage by substituting obligors and pleading for deficiency against them *without setting forth any cause of action to establish the legal debt* against the obligors. Under Respondent’s pleading it would be impossible to

⁵ This paragraph is an extended quote *in toto* from the Court’s opinion in *Mortg. Recovery v. Heritage Clipper Riv.*, 327 S.C. 491, 493. 489 S.E.2d 655 (Ct.App. 1997).

⁶ In pertinent part here, this statute provides, “...[A]nd if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.”

separate out the legal issues from the equitable ones, as there are no legal issues pled in the complaint.

S.C. Code Ann § 29-3-660 does not relieve any party from the rules governing the pleading of actions, nor does it otherwise permit a party to fail to plead elements of a cause of action. South Carolina's rules of pleading were adopted subsequent to the statute. Therefore, there is no presumption that this statute may be read inconsistently with the rules of civil procedure or without regard to the rules. The rules of procedure and the statutes must be read so as to be harmonized. Cf Grazia v. S.C. State Plastering, 390 S.C. 562, 575, 703 S.E.2d 197 (2010) ("Once properly harmonized, we find no fatal conflict between the Right to Cure Act and this State's class action jurisprudence....").

Once a mortgage is reformed the statute does not allow the mortgage to be made retroactive so as subject *third parties* to a deficiency judgment liability absent a specific pleading brought in an action "at law" having been properly pled. This is important because defenses could have been raised to an "at law" cause of action on the note. One such example is an established course of dealing on the short term notes used by plaintiff in this instance. Such a course of dealing can have an effect of lulling one into a false sense of security distracting one from the realization of the importance of seeking alternative financing or creative selling strategies for the property⁷ or other such defenses such as: waiver, estoppel, unclean hands or intervening circumstances or even the assertion of a new agreement if the facts warrant.

⁷ See *Satcher v. Woodmen of the World L. Ins. Soc.*, 199 S.C. 59, 69, 18 S.E.2d 523 (1942), "Where one dealing with another has by its course of dealing, through leniency or otherwise, lulled that person into a sense of security, then the one doing those things cannot, when a loss occurs, in order to escape its liability, fall back upon the strict terms of a contract, the terms of which the one liable on the contract has led the other party to believe would not be strictly enforced."

Moreover, the *prayer for relief* in Respondent's pleading asks that the "Mortgager [sic] be reformed as set-forth in the Second Cause of Action." However, this request is wholly inconsistent with the body of the pleading's second cause of action which sought *foreclosure*, not reform. Thereafter, plaintiff prays that, "a deficiency judgment be entered against the Defendants, jointly and severally, in such amount as the Court may deem appropriate." Again, there was no "at law" pleading independent of the foreclosure portion of the complaint. Such has to be established before the mortgage may be foreclosed and deficiency entered, we submit. S.C. Code Ann § 29-3-660 is a deficiency judgment statute. It is not a mortgage reformation statute. Respondent's pleading and prayer for relief do not establish that the individual defendants entered into a covenant with respect to the mortgaged property and are therefore legally subject to joint and several liability in a deficiency judgment setting. The statute allows for an equitable pleading and a deficiency, not two equitable pleadings and a deficiency judgment at law without complying with rules of procedure.

Thus, the general rule acknowledged in *Bartles v. Livingston*, 282 S.C. 448, 319 S.E.2d 707 (Ct.App. 1984) is not applicable in this case for two reasons.⁸ First, that case did not involve a reformation of a mortgage so as to rename the borrowers under the note; and secondly, unlike the instant case, the mortgagor(s) in *Bartles, supra*, were the actual individuals who granted the mortgage.

⁸ The general rule is as follows: "Absent grounds to set aside the decree of foreclosure, there is no discretion to cut off the right to a deficiency after sale where (1) the complaint in the foreclosure action asks for personal judgment, (2) the amount of the debt is fixed in the foreclosure decree, and (3) the sale is insufficient to satisfy the entire debt. 282 S.C. at 461.

ARGUMENT II

The Court committed error when it allowed Respondent to reform its mortgage by pleading a “scrivener’s error.” (Question III).

The Respondent did not specifically plead a *mutual mistake*, it actually pled that a *scrivener’s error* occurred. **ROA 46.** Appellants asserted that a mutual mistake was not made in this instance as a defense. A written instrument may be reformed on the basis of mistake only when the mistake is a mutual mistake of the parties. *Commercial Union Assurance Company v. Castile*, 283 S.C. 1, 4, 320 S.E.2d 488, 490 (Ct.App. 1984); *Southern Realty & Const. Co. v. Bryan*, 290 S.C. 302, 350 S.E.2d 194 (Ct.App. 1986). The Respondent has not pled that a mistake occurred in this case, mutual or not, nor has it established that one occurred. Rather, Respondent alleged that a “scrivener’s error” occurred and that it was the “*scrivener’s error*” that was “mutual among the parties.” (See Complaint at page 4, ¶ 15). The parties were not scriveners in this matter, thus, a scrivener’s error could not be mutual.

Moreover, the testimony at trial established that from the time the mortgage was given until the time of the foreclosure action, a total of twenty-one months, no one took any action to correct the alleged “scrivener’s error.” This was so even though two modification agreements were entered into between the parties during that time, and a third had been refused by Respondent. If a scrivener’s error had occurred in this transaction, such error would should have been noticed immediately, we submit, when first read. To the contrary, however, it was only when it became convenient for the Respondent that the “errors” began to be discovered in the mortgage. Even then,

Respondent alleged a *scrivener's error* in its complaint rather than a *mutual mistake*.⁹

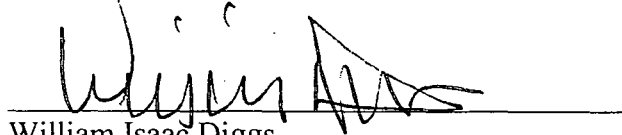
They are not the same thing.

CONCLUSION

For the foregoing reasons, Appellants would respectfully request this Court reverse the Order allowing the deficiency judgment in this case.

Respectfully submitted,

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This 30 day of January, 2012
Myrtle Beach, South Carolina

⁹ "Reformation of an instrument based on mutual mistake is permitted only where there is clear proof that the parties to the instrument made the same mistake and that both parties understood the instrument as the party seeking reformation alleges it ought to have been. See *Snedegar v. Midwestern Indemn. Co.* (1988), 44 Ohio App.3d 64, 69, 541 N.E.2d 90. The party alleging mutual mistake has the burden of proving its existence by clear and convincing evidence. *Castle v. Daniels* (1984), 16 Ohio App.3d 209, 475 N.E.2d 149." *Key Bank Natl. Assoc. v. Bolin*, 2010 CA 00285 (8-22-2011), Op. No. 4532 (Ohio 2011). A mutual mistake is one "where the parties agree to one thing and then, due to either a scrivener's error or inadvertence, express something different in the written instrument." *Feldman v. Kritch*, 824 So.2d 274, 277 (Fla. 4th DCA 2002).

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master in Equity
Case No. 2009-CP-26-5479

Fidelity Bank,

Respondent,

v.

Cox Investment Group, LLC, Jeffrey E. Cox, Bobby E.
Lucas, Darren K. Lucas, and the Margate Tower At
Kingston Plantation Property Owners' Association, Inc.,

Defendants

Of Whom

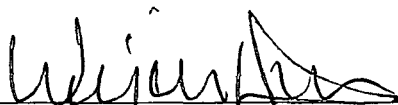
Cox Investment Group, LLC, Jeffrey E. Cox, Bobby E.
Lucas, and Darren K. Lucas are

Appellants

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR. Additionally, counsel certifies that the Final Brief of Appellant is in compliance with the Supreme Court's August 13, 2007 order regarding personal data identifiers and sensitive information.

January 30, 2012



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Bobby E. Lucas, and Darren K. Lucas are Appellants.

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STATEMENT OF ISSUES ON APPEAL

1. DID THE MASTER-IN-EQUITY CORRECTLY HOLD THAT RESPONDENT'S AMENDED COMPLAINT STATED SUFFICIENT FACTS THAT, WHEN VIEWED IN A LIGHT MOST FAVORABLE TO RESPONDENT, ENTITLED IT TO A DEFICIENCY JUDGMENT AGAINST THE APPELLANTS?
2. DID THE MASTER-IN-EQUITY CORRECTLY HOLD THAT RESPONDENT'S AMENDED COMPLAINT STATED FACTS THAT, WHEN VIEWED IN A LIGHT MOST FAVORABLE TO RESPONDENT, ENTITLED IT TO REFORM A SCRIVENER'S ERROR AND CONFORM THE MORTGAGE TO THE AGREEMENT AND INTENT OF THE PARTIES?

STATEMENT OF THE CASE

Respondent initiated this lawsuit by way of a Complaint filed in Horry County, South Carolina on June 2, 2009 seeking to foreclose a Mortgage dated October 3, 2007 (the “Mortgage”) executed and delivered by Appellant Cox Investments Group, LLC (“Cox Investments”). (R. pp. 22-27) The Defendants timely answered. On October 7, 2009, the trial court entered an Order of Reference pursuant to Rule 53, SCRCPP. (R. pp. 69-71) On April 28, 2010, the Honorable Cynthia Graham Howe (the “Master”) filed an Order granting Respondent’s Motion to Amend the Complaint. (R. p. 81) On May 4, 2010, Respondent filed its Amended Complaint, seeking that the Mortgage be reformed to correct a scrivener’s error and seeking foreclosure of the Mortgage. (R. pp. 43-50)

The Amended Complaint states that Bobby E. Lucas, Darren K. Lucas, and Jeffery E. Cox (the “Individual Appellants”) borrowed \$860,000.00 from Respondent on October 3, 2007. (R. p. 44) Cox Investments intended to secure the indebtedness of the Individual Appellants by placing a mortgage on real property titled in the name of Cox Investments. (R. pp. 45-46) However, the Mortgage contains a scrivener’s error in that it inaccurately reflects that the “Borrower” is Cox Investments while the actual “Borrowers” are the Individual Appellants. (R. p. 46) No party to the loan transaction noticed the scrivener’s error in the Mortgage. (R. p. 46)

The payments due on the Note have not been made as provided by the Note and Mortgage. (R. p. 47) Under the terms and conditions of the Note and Mortgage, it is provided that in the event of default, the entire principal and accrued interest shall at once become due and payable, at the option of the holders, and the mortgagee shall have power to sell said premises according to law. (R. pp. 28-40) After the Appellant’s default,

Respondent elected to require immediate payment of the entire amount due and placed the Note and Mortgage into the hands of its attorneys for collection and pursued all available remedies under the Note and Mortgage. (R. p. 47)

Appellants answered the Amended Complaint on May 11, 2010. (R. p. 53) In their Answer, Appellants admitted that Respondents Bobby E. Lucas, Darren K. Lucas, and Jeffery E. Cox (the “Individual Appellants”) executed and delivered unto Respondent a Note dated October 3, 2007 promising to pay Respondent the original amount of Eight Hundred and Sixty Thousand and 00/100 (\$860,000.00) Dollars (the “Note”). (R. p. 55) Appellants further admitted that the Individual Appellants executed and delivered Note Modification Agreements extending the maturity date on April 9, 2009 and October 9, 2008. (R. p. 55)

On June 16, 2011, the Master conducted a merits hearing. After the hearing, Appellants submitted a Memorandum in Support of Judgment. Respondents filed a responsive memorandum on July 5, 2011. (R. p. 76) On August 29, 2011, the Master ruled in favor of Respondent, and she filed an Order on September 12, 2011 (the “Order”). (R. pp. 1-14) Appellants timely filed this appeal.

STANDARD OF REVIEW

This court reviews all questions of law de novo. Fesmire v. Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct.App.2009). In this appeal, Appellants attack the sufficiency of Respondent’s Amended Complaint as a matter of law under Rule 12(b)(6), SCRPC, and ask that this Court consider whether the Amended Complaint states a claim for the relief awarded by the Master. In their first argument, Appellants contend that Respondent’s Amended Complaint fails to establish the right to a deficiency judgment

against the Appellants, and they contend that the Master's reliance on S.C. Code Ann. § 29-3-660 was error because of the alleged pleading deficiency. In their second argument, Appellants contend that the Amended Complaint failed to state a claim for reformation.

Under Rule 12(b)(6), SCRCF, a party may move to dismiss a complaint against him based on a failure to state facts sufficient to constitute a cause of action. Cole Vision Corp. v. Hobbs, 394 S.C. 144, 148-49, 714 S.E.2d 537, 539 (2011). In considering a motion to dismiss under Rule 12(b)(6), the circuit court must base its ruling solely on the allegations set forth in the complaint. Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007). Such a motion may not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. Id. The question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Id.

ARGUMENTS

I. The Master correctly held that Respondent's Amended Complaint was sufficient to entitle it to a deficiency judgment against Appellants and correctly relied on S.C. Code Ann. § 29-3-660 in granting the deficiency judgment against Appellants.

Under South Carolina law, the right to a deficiency judgment in foreclosure actions is statutory, arising from S.C. Code Ann. § 29-3-660, which provides that "the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage." Additionally, with regard to third party obligors, S.C. Code Ann. § 29-3-660 states that where "mortgage debt [is] secured by the covenant or obligation of any person other than

the mortgagor . . . the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment.”

South Carolina courts have repeatedly held that the right to pursue a deficiency judgment is not within the discretion of the court and cannot be denied unless expressly waived. E.g., Am. Gen. Fin. Serv., Inc. v. Brown, 376 S.C. 580, 583-84, 658 S.E.2d 99, 100-01 (2008); Perpetual Bldg. and Loan Ass’n of Anderson v. Braun, 270 S.C. 338, 343, 242 S.E.2d 407, 409 (1978); Goethe v. Cleland, 323 S.C. 50, 54, 448 S.E.2d 574, 576 (Ct.App.1994); Bartles v. Livingston, 282 S.C. 448, 460, 319 S.E.2d 707, 714 (Ct.App.1984). Furthermore, a mortgagee does not forfeit the right to a deficiency judgment “merely because he elects initially to pursue his remedy by foreclosure.” Brown, 376 S.C. at 583, 658 S.E.2d at 100 (quoting Braun, 270 S.C. at 343, 242 S.E.2d at 408). Rather, “an action for a deficiency judgment as a sequel to foreclosure is taken as a matter of course.” Id. While the court does not have discretion to *cut off* the right to a deficiency judgment, it does have the discretion *to award* a deficiency judgment, even if the mortgagee fails to demand a deficiency judgment in its pleadings. Bartles, 282 S.C. at 460.

As noted above, the South Carolina Supreme Court has held that “an action for a deficiency judgment as a sequel to foreclosure is taken as a matter of course.” Brown, 376 S.C. at 583, 658 S.E.2d at 100 (quoting Braun, 270 S.C. at 341, 242 S.E.2d at 408). Traditionally, an action for foreclosure is based in equity and an action for a judgment is based in law; however, with regard to foreclosure actions, that strict distinction has long since been abandoned by South Carolina courts. Braun, 270 S.C. at 343, 242 S.E.2d at 409). Instead of being separate, distinct actions, the South Carolina Supreme Court has

held “that a judgment for deficiency is merely incidental to the relief sought [in] a foreclosure action.” Id. (citing McConnel et al., v. Barnes, 142 S.C. 112, 140 S.E. 310 (1927)).

In demanding a deficiency judgment incident to a foreclosure action, a mortgagee need not even “plead specifically for a deficiency judgment.” Braun, 270 S.C. at 341, 242 S.E.2d at 408. Because courts have “‘inherent power’ to authorize a decree for deficiency . . . no specific notice or motion need be given to the defendants inasmuch as such decree follows implicitly.” Id. Furthermore, because a deficiency judgment is merely an incident of an action for foreclosure, “it may be granted under a general prayer for relief.” Id. (quoting 55 AM. JUR. 2d Mortgages § 909 (1964)).

Consequently, the South Carolina Supreme Court has ruled that so long as “(1) the complaint in the foreclosure action asks for a personal judgment; (2) the amount of debt is fixed in the foreclosure decree; and (3) the sale is insufficient to satisfy the entire debt,” South Carolina courts have “no discretion to cut off the right to a deficiency [judgment] after [the foreclosure] sale.” Brown, 376 SC at 584, 658 S.E.2d at 101 (quoting Bartles, 282 S.C at 461, 319 S.E.2d at 715). If a mortgagee satisfies the three requirements set forth in Bartles, the only action available to the court is to “defer the granting of personal judgment until a deficiency actually results from the sale.” Bartles, 282 S.C. at 461.

A. The Master correctly held that Respondent’s Amended Complaint was sufficient to entitle it to a deficiency judgment.

In this case, Appellants set forth two claims regarding the sufficiency of the Respondent’s pleadings. First, Appellants assert that Respondent failed to sufficiently

plead its demand for a deficiency judgment in the Amended Complaint. Specifically, Appellants argue that Respondent failed to make a requisite “‘at law’ pleading [for deficiency judgment] independent of the foreclosure portion of the complaint.” [App. Br. 14.] Appellant claims that this distinct, legal cause of action for a deficiency judgment “has to be established before the mortgage may be foreclosed and deficiency entered.” *Id.* Second, Appellants contend that Respondent failed to “allege that the individual defendants are persons who secured the mortgage debt with a prior covenant or obligation as contemplated by statute § 29-3-660.” [App. Br. 12.] Because the Respondent failed to plead this allegation in the Amended Complaint, Appellants claim they are not “legally subject to joint and several liability in a deficiency judgment setting.” *Id.* at 14.

1. Respondent’s Amended Complaint satisfied the pleading requirements for deficiency judgments.

As to the claim that Respondent was required to plead a separate and distinct cause of action “at law” for a deficiency judgment, it appears that Appellants have misread and misapplied the law. South Carolina courts have held that a deficiency judgment is such an incident to the remedy sought in a foreclosure action that it can be awarded based solely upon a general prayer for relief and does not require pleading a distinct cause of action as the Appellant claims. *Braun*, 270 S.C. at 341, 242 S.E.2d at 408.

Here, Respondent met the minimum pleading requirements when it specifically demanded in the prayer “that a deficiency judgment be entered against the Defendants, jointly and severally, in such amount as the court may deem appropriate.” (R. p. 49) As

the Master noted in her order, “the request [for a deficiency judgment] could not be clearer.” (R. p. 4)

Furthermore, Respondent met all three elements of the Bartles analysis.¹ Respondent specifically requested that the court grant a judgment against the Appellants; the debt was stated in a amount fixed on August 29, 2011 in the foreclosure decree at \$1,052,277.90 Dollars, together with interest at the rate of 5.00% per annum (\$119.44 per diem); and the sale was insufficient to satisfy the entire debt. (R. pp. 48-49; R. pp. 8-13) Because the Bartles elements were satisfied, the Master did not have discretion to deny a deficiency judgment against Appellants.

Finally, the Master had the discretion to award a deficiency in favor of Respondent against Appellants as the Respondent did not waive its right to a deficiency judgment. Even if Respondent had failed to sufficiently request a deficiency judgment in its pleadings, and even if Respondent had failed to satisfy the elements of the Bartles analysis, the Master had the inherent power to order a deficiency judgment against Appellants in favor of Respondent.

2. Respondent’s Amended Complaint satisfied S.C. Code § 29-3-660.

Appellants’ second claim regarding the sufficiency of Respondent’s pleadings centers on the language of S.C. Code § 29-3-660. Specifically, Appellants contend that Respondent failed to “allege that the individual defendants are persons who secured the

¹ Appellant argues that the Bartles analysis is inapplicable here because Respondent sought to reform the mortgage and because the individual Appellants signed the promissory note but not the mortgage. As the Master-in-Equity noted, these arguments are inapposite. First, the action for reformation and the action for foreclosure are separate causes of action that each stand on their own merits. One has no bearing on the other. Second, as signatories on the promissory note, Appellants are precisely to whom section 29-3-660 and applicable deficiency judgment cases apply.

mortgage debt with a prior covenant or obligation as contemplated by statute § 29-3-660.” [App. Br. 12.] Under section 29-3-660, where “mortgage debt [is] secured by the covenant or obligation of any person other than the mortgagor,” the court may award a judgment against such persons in favor of the mortgagee if a deficiency results from the foreclosure sale.

Here, Respondent has *explicitly* alleged that the individual Appellants are persons who secured the mortgage debt with a prior covenant or obligation. In its Amended Complaint, Respondent alleges that

On October 3, 2007, Bobby E. Lucas, Darren K. Lucas and Jeffrey E. Cox executed and delivered unto the Plaintiff that certain Note . . . , wherein for valuable consideration, Bobby E. Lucas, Darren K. Lucas and Jeffrey E. Cox promised to pay to the plaintiff the original amount of Eight Hundred Sixty Thousand and 00/100 (\$860,000) Dollars pursuant to the terms and conditions of said Note.

(R. p. 44) As the Master noted, “the reformed mortgage is not the ‘covenant or obligation’ that gives rise to the individual Defendant’s liability for the deficiency judgment;” rather, “that ‘covenant or obligation’ is the Note and its modifications.” (R. pp. 2-3) Contrary to the Appellants’ assertions, the Respondent explicitly alleged that the Appellants are persons who secured the mortgage debt with a prior covenant or obligation as is required by section 29-3-660.

3. The Master correctly relied on S.C. Code Ann. § 29-3-660 in granting the deficiency judgment against Appellants.

Appellants assert that the Master improperly relied on section 29-3-660 in awarding a deficiency judgment in “this mortgage reformation case.” [App. Br. 5.] Further, Appellant argues that “S.C. Code Ann. § 29-3-660 is a deficiency judgment

statute . . . not a mortgage reformation statute” and that it “is silent regarding actions to reform a mortgage.” [App. Br. 12-14.] Appellants have misread and misapplied the law.

As the Master stated in her order:

[A]n action for reformation of the Mortgage and an action for the foreclosure of the mortgage are different causes of action that each must stand on their own merits. If the Plaintiff can prove the elements necessary for the Mortgage to be reformed, it is entitled to that relief. Then, if the Plaintiff can prove that is entitled to foreclose on the reformed Mortgage, it is entitled to that relief also, including the award of a deficiency judgment.

(R. p. 2)

The actions for reformation and foreclosure are independent causes of action. S.C. Code Ann. § 29-3-660 *is* a deficiency judgment statute and “a judgment for deficiency is merely incidental to the relief sought [in] a foreclosure action.” Braun, 270 S.C. at 341, 242 S.E.2d at 408. As noted above, S.C. Code Ann. § 29-3-660 states that where “mortgage debt [is] secured by the covenant or obligation of any person other than the mortgagor,” the court may award a judgment against such persons in favor of the mortgagee if a deficiency results from the foreclosure sale.” Those are precisely the circumstances that exist in this matter. Accordingly, the Master did not erroneously rely on S.C. Code Ann. § 29-3-660 in a foreclosure proceeding.

II. The Master correctly held that the Respondent’s Amended Complaint stated a claim for modification of the Mortgage to correc the scrivener’s error.

Appellants seek to capitalize on a scrivener's error in the mortgage and to use semantics to avoid the transaction that both parties clearly intended to enter. Appellants admit that the Amended Complaint states a "scrivener's error" occurred, and that the "scrivener's error was mutual among the parties." [App. Br. p. 15.] Appellants argue that Respondent's allegation of a mutual scrivener's error cannot be construed to be a "mutual mistake" even while Appellants fail to cite to a single authority for this proposition.

First, Appellants are not mindful of the lenient standard applicable to their Rule 12(b)(6) motion. In this appeal, Appellants have not challenged the sufficiency of the evidence presented or whether it established a mutual mistake.² Rather, Appellants have challenged the Amended Complaint under Rule 12(b)(6), SCRCF. Therefore, Respondent is entitled to have its allegations viewed in the light most favorable to it and have every doubt resolved in its behalf as this Court determines whether Respondent has stated a cause that will allow for reformation of the Mortgage. Cole Vision Corp., 394 S.C. at 148-49, 714 S.E.2d at 539.

In this case, Respondent unambiguously alleged a mistake in the drafting of a document, mutual to all parties to the loan transaction on October 3, 2007, that resulted in the drafting of a Mortgage that did not reflect the agreement and intend of the parties. (R. pp. 44-47) These allegations, viewed in a light most favorable to Respondent, state a claim for reformation. See Sullivan v. Moore, 92 S.C. 305, 75 S.E. 497 (1912).

² Respondent's reformation action was tried by the express or implied consent of the parties. [Tr. p. 49-53, 68-79, 84-93.] Since the parties presented evidence regarding the reformation action and argued the merits at trial, Rule 15(b), SCRCF provides that Respondent's reformation action shall be treated in all respects as if it was raised in the Amended Complaint. This is an alternative sustaining ground under Rule 220(c), SCACR.

Second, Appellants overlook clear South Carolina precedent that demonstrates that alleging a scrivener's error in an executed agreement is sufficient to state a successful claim for reformation under a theory of mutual mistake. In Sullivan, the South Carolina Supreme Court affirmed the trial court's decision to reform a deed which omitted the phrase "her heirs and assigns" from both the premises and habendum clause of the deed to create a life estate. Sullivan v. Moore, 92 S.C. 305, 75 S.E. 497 (1912). The Court undertook a common-sense approach to the issue of reformation, specifically rejecting the notion that courts "must look away from the obvious" when faced with an action to reform an agreement that is clearly out of line with the transaction and the parties' apparent intent. Id. The Court held, even over the objection and contradictory testimony of one of the parties to the transaction, that a "mutual mistake" had occurred when the parties executed the deed erroneously reduced to writing by the grantee's husband. Id.

Similarly, in Jumper v. Queen Mab Lumber Co., the South Carolina Supreme Court reformed a contract on the theory of "mutual mistake" when that contract, drawn up by an attorney rather than the parties, did not reflect the actual intent and agreement of the parties. 115 S.C. 452, 106 S.E. 473, 475 (1921). In Jumper, the contract purported to be a written contract for the sale of land; however, the parties actually only agreed for the sale of timber rights on the land because the plaintiff did not own the land itself. Id. The Court stated:

The theory of the defendant, supported as we think by the evidence, is that there was a valid contract between them and the plaintiff for the sale and purchase of the timber rights, but that the written contract, the evidence of their agreement, does not express the terms of that agreement, but by mistake contains terms contrary to the common intention of the parties;

that for that reason they are entitled to have the contract accordingly reformed, and to have it specifically enforced when thus reformed.

Id. at 476. The Court undertook a detailed analysis of numerous decisions in courts of equity permitting reformation under the theory of mutual mistake when a scrivener's error results in an agreement being signed that does not reflect the agreement and intent of the parties to the transaction. Id. at 477.

By allowing reformation as a remedy when a scrivener's error occurs, South Carolina is in accordance with the general rule followed in other jurisdictions. See 66 AM. JUR. 2D Reformation of Instruments § 19 ("The remedy of reformation is appropriate where, by reason of a mistake by a scrivener or draftsman, the written agreement does not accurately reflect the intent of the parties."); RAL Management, Inc. v. Valley View Assoc's, 926 A.2d 704 (Conn. App. 2007); In re Estate of Munawar, 981 A.2d 584 (D.C. 2009); Amin v. Guruom, Inc., 635 S.E.2d 105 (Ga. 2006); Lederman v. Prudential Life Ins. Co. of Am., Inc., 897 A.2d 373 (N.J. App. 2006); In re Estate of Summerlin, 989 So. 2d 466 (Miss. Ct. App. 2008).

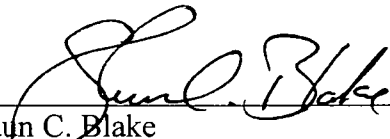
Appellants contend that the mistake could not be mutual because "the parties were not the scriveners." [App. Br. p. 15.] However, courts do not look to the identity of the scrivener, as the "oversight of the parties" in executing the flawed document constitutes the mutual mistake. 66 AM. JUR. 2D Reformation of Instruments § 19 (citing Potter's Properties, LLC v. VNS Corp., 703 S.E.2d 79 (Ga. App. 2010)). Regardless of who acts as the scrivener or who retained the scrivener, the real concern when deciding whether to reform the document on the grounds of "mutual mistake" when a scrivener's error occurs is whether the document expresses the agreement. Sikora v. Vanderploeg, 212 S.W.3d

277, 290 (Tenn. Ct. App. 2006). Since Respondent alleged mutuality in the error and the execution of an agreement that does not reflect the agreement or intent of the parties to the loan transaction on October 3, 2007, it properly stated a claim for reformation.

CONCLUSION

For the reasons set forth herein, the undersigned respectfully request that the Order of the Master be affirmed.

Respectfully Submitted:



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- & -

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Attorneys for Respondent

This the 29th day of February, 2012.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master in Equity
Case No. 2009-CP-26-5479

Fidelity Bank, ... Respondent,

v.

Cox Investment Group, LLC, Jeffrey E. Cox, Bobby E.
Lucas, Darren K. Lucas, and the Margate Tower At
Kingston Plantation Property Owners' Association, Inc., ... Defendants,

Of Whom Cox Investment Group, LLC, Jeffrey E. Cox,
Bobby E. Lucas, and Darren K. Lucas are Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR. Additionally, counsel certifies that the Final Brief of Appellant is in compliance with the Supreme Court's August 13, 2007 order regarding personal data identifiers and sensitive information.

February 29th, 2012


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THE STATE OF SOUTH CAROLINA
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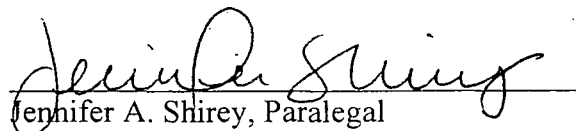
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Of Whom Cox Investment Group, LLC, Jeffrey E. Cox,
Bobby E. Lucas, and Darren K. Lucas are Appellants.

CERTIFICATE OF SERVICE

I, an employee of the law firm of Ellis, Lawhorne & Sims, P.A., do hereby certify that I served a copy of Respondent's Final Brief this the 29th day of February, 2012 upon all counsel of record by depositing same in the U.S. Mail, postage prepaid and addressed as follows:

William Isaac Diggs, Esquire
LAW OFFICES OF WILLIAM ISAAC DIGGS
1700 Oak Street, Suite D
Myrtle Beach, South Carolina 29577


Jennifer A. Shirey, Paralegal

**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**

Fidelity Bank, Respondent,

v.

Cox Investment Group, LLC, Jeffrey E. Cox, Bobby E.
Lucas, Darren K. Lucas, and the Kingston Plantation
Property Owners's Association, Inc., Defendants,

Of Whom Cox Investment Group, LLC, Jeffrey E. Cox,
Bobby E. Lucas, and Darren K. Lucas are, Appellants.

Appellate Case No. 2011-201006

Appeal From Horry County
Cynthia Graham Howe, Master-in-Equity

Unpublished Opinion No. 2012-UP-603
Heard October 17, 2012 – Filed November 7, 2012

AFFIRMED

William Isaac Diggs, of Law Office of William Isaac
Diggs, of Myrtle Beach, for Appellants.

Shaun C. Blake, of Ellis Lawhorne & Sims PA, of
Columbia, for Respondent.

PER CURIAM: Jeffrey E. Cox, Bobby E. Lucas, Darren K. Lucas, and Cox Investment Group, LLC (collectively, Appellants) appeal the master-in-equity's (1) award of a deficiency judgment and (2) reformation of a mortgage. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether Fidelity Bank failed to sufficiently allege and prove a claim for reformation of the mortgage¹: *George v. Empire Fire & Marine Ins. Co.*, 344 S.C. 582, 590, 545 S.E.2d 500, 504 (2001) ("A contract may be reformed on the ground of mistake when the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it." (citing *Crosby v. Protective Life Ins. Co.*, 293 S.C. 203, 206, 359 S.E.2d 298, 300 (Ct. App. 1987)); *Comm. Union Assur. Co. v. Castile*, 283 S.C. 1, 4, 320 S.E.2d 488, 490 (Ct. App. 1984) ("A mutual mistake is one whereby both parties intended a certain thing and by mistake in the drafting did not get what both parties intended.").

2. As to whether Fidelity Bank failed to sufficiently allege and prove a claim for deficiency judgment: *Perpetual Bldg. & Loan Ass'n of Anderson v. Braun*, 270 S.C. 338, 339-41, 242 S.E.2d 407, 407-08 (1978) (holding "a deficiency judgment to be such an incident of mortgage foreclosure that it may be supported by a general prayer for relief" and a creditor "may proceed by foreclosure to satisfy his lien"; "It has been held that a court has inherent power to authorize a decree for deficiency, and that no specific notice or motion need be given to the defendant inasmuch as such decree follows implicitly. Moreover, since a decree for a deficiency is an incident of a foreclosure suit in equity, it may be granted under a prayer for general relief" (citations and internal quotation marks omitted)); *see also Bartles v. Livingston*, 282 S.C. 448, 319 S.E.2d 707 (Ct. App. 1984) (discussing the history of pleading foreclosures and deficiency judgments and addressing the import of *Braun*).

AFFIRMED.

¹ We note Appellants contend the master erroneously relied upon S.C. Code Ann. § 29-3-660 (2011) in reforming the mortgage. However, the order clearly indicates the court treated the statute and the reformation action separately. It did not conflate the analysis of the issues before it, and we therefore find this argument without merit.

HUFF, THOMAS, and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master In Equity
Case No. 2009-CP-26-5479

Fidelity Bank,

Respondent,

v.

Cox Investment Group, LLC, Jeffrey E. Cox, Bobby E.
Lucas, Darren K. Lucas, and the Margate Tower At
Kingston Plantation Property Owners' Association, Inc.,

Defendants

Of Whom

Cox Investment Group, LLC, Jeffrey E. Cox, Bobby E.
Lucas, and Darren K. Lucas are

Appellants

APPELLANTS' PETITION FOR REHEARING

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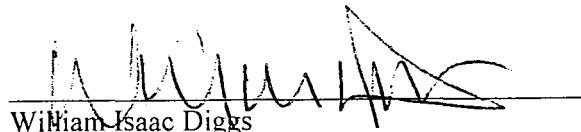
ATTORNEY FOR APPELLANTS

COME NOW THE APPELLANTS, by and through their undersigned counsel, pursuant to S.C.A.C.R. 221 and 240, who would petition this Court for rehearing in this matter. Said motion is based on the following grounds: (1) The Court misperceived Appellants' Argument I. We did not argue that the trial court conflated the issues, but that the reformation and the deficiency judgment actions could not be maintained simultaneously; and (2) In Argument II the (a) general deficiency judgment rule enunciated in *Bartles v. Livingston*, 282 S.C. 448, 319 S.E.2d 707 (Ct. App. 1984) and *Perpetual Bldg. & Loan Ass'n of Anderson v. Braun*, 270 S.C. 338, 339-41, 242 S.E.2d 407, 407-08 (1978) was not applicable in this case because reformation was also sought simultaneously naming additional mortgagors, without a legal cause of action having been plead in the litigation in the first instance establishing legal damages against them; and (b) respondents plead "scriveners error" not "mutual mistake," and this Court misapplied the mutual mistake analysis to the case as opposed to "scriveners error."

WHEREFORE, Appellants would respectfully request a re-hearing on the above points and seek a reversal of the trial Court's order in this matter.

Respectfully submitted

LAW OFFICES OF WILLIAM ISAAC DIGGS



William Isaac Diggs
1700 Oak Street, Suite D
Myrtle Beach, SC 25977
843-626-4243

ATTORNEY FOR APPELLANTS

This 16th day of November, 2012
Myrtle Beach, South Carolina

**MEMORANDUM IN SUPPORT OF
APPELLANTS' PETITION FOR REHEARING**

Appellants framed the issues in this appeal in the Brief of Appellants in the following way.

STATEMENT OF ISSUES ON APPEAL

- I. Did Respondent's pleading state sufficient facts to entitle it to a deficiency judgment?
- II. Did the Respondent's pleading state sufficient facts to establish the right to the legal remedy of third party deficiency judgment when the pleading sought only equitable relief of mortgage reformation and foreclosure of the reformed mortgage of which the third parties were not mortgagors?

Sub Issue: Did the trial court erroneously rely on S.C. Code Ann § 29-3-660 in this mortgage reformation case to allow for deficiency judgment?
- III. Was an action for reformation of the mortgage sufficiently pled?

Brief of Appellants at page 5.

I.

Regarding the initial two issues, Appellants combined them into a single argument in brief. Appellants argued that the Respondent's pleading did not state sufficient facts to establish the right to the legal remedy of third party deficiency judgment when the pleading sought only equitable relief of mortgage reformation and foreclosure of the reformed mortgage of which the third parties were not mortgagors. Appellants also asserted that a sub issue within this argument is the question of whether the trial court "erroneously [relied] on S.C. Code Ann § 29-3-660 in this mortgage reformation case to allow for deficiency judgment? In its opinion. This Court stated

- 1. As to whether Fidelity Bank failed to sufficiently allege and prove a claim for reformation of the mortgage: *George v. Empire Fire & Marien Ins. Co.*, 344 S.C. 582, 590, 545 S.E.2d

500, 504 (2011) (“A contract may be reformed on the ground of mistake when the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it.” (citing *Crosby v. Protective Life Ins. Co.*, 293 S.C. 203, 206, 359 S.E.2d 298, 300 (Ct. App. 1987); *Comm. Union Assur. Co. v. Castile*, 283 S.C. 1, 4, 320 S.E.2d 488, 490 (Ct. App. 1984) (“A mutual mistake is one whereby both parties intended a certain thing and by mistake in the drafting did not get what both parties intended.”))

We respectfully submit that the Court misperceived Appellants’ argument. In footnote “1” of its opinion, this Court stated,

We note Appellants contend the master erroneously relied upon S.C. Code Ann. § 29-3-660(2011) in reforming the mortgage. However, the order clearly indicates the court treated the statute and the reformation action separately. It did not conflate the analysis of the issues before it, and we therefore find this argument without merit.

Appellants did not make this argument, we submit. Appellants argued, “That in a mortgage reformation action a plaintiff *cannot simultaneously* seek a deficiency judgment and a reforming of the mortgage in order to establish a covenant by third parties regarding the mortgaged property.” **R. 63** (mid paragraph); **Brief of Appellants p. 12**. Emphasis added. At least, such cannot be allowed absent a cause of action which establishes a liability under the note at issue.

We made that argument because it puts defendants in an impossible position. They cannot plead legal defenses or affirmative defenses to an action on a note which has not been brought. Respondent has been allowed to seek a deficiency judgment with respect to causes of action which have not yet come into existence. To say it in another way, we did not know whether the reformation request was going to be granted. Thus, we did not know if S.C. Code Ann. § 29-3-660 would be applicable to the individual appellants or not. The trial Court allowed the reformation to be granted and then *retroactively applied* that holding so as to allow for a

deficiency judgment against individuals who were strangers to the mortgage before any action was filed.

We respectfully request that this Court grant this petition for rehearing and hold that the trial court erred when it allowed the reformation and the deficiency judgment actions to be maintained simultaneously under the facts presented in this case.

II.

The third issue presented for review, “ Was an action for reformation of the mortgage sufficiently pled?” In Argument II in their brief, Appellants asserted that the Court committed error when it allowed Respondent to reform its mortgage by pleading a “scrivener’s error.” In the second portion of the Court’s opinion, this Court stated,

2. As to whether Fidelity Bank failed to sufficiently allege and prove a claim for deficiency judgment: *Perpetual Bldg. & Loan Ass’n of Anderson v. Braun*, 270 S.C. 338, 339-41, 242 S.E.2d 407, 407-08 (1978) (holding “a deficiency judgment to be such an incident of mortgage foreclosure that it may be supported by a general prayer for relief” and a creditor “may proceed by a foreclosure to satisfy his lien”; “It has been held that a court has inherent power to authorize a decree for deficiency, and that no specific notice or motion need be given to the defendant inasmuch as such decree follows implicitly. Moreover, since a decree for a deficiency is an incident of a foreclosure suit in equity, it may be granted under a prayer for general relief” (citations and internal quotation marks omitted)); see also *Bartles v. Livingston*, 282 S.C. 448, 319 S.E.2d 707 (Ct. App. 1984) (discussing the history of pleading foreclosures and deficiency judgments and addressing the import of *Braun*).

a. We respectfully submit that neither *Braun* nor *Bartles v. Livingston* involved a mortgage reformation request which simultaneously sought to add new individual parties to the mortgage, in the same action as the foreclosure in which the deficiency judgment was sought against the newly installed mortgagors. (See *Braun* at 270 S.C. at 339, “The sole matter for review is the propriety of granting a deficiency judgment when it was not specifically demanded in the foreclosure complaint. We hold a deficiency judgment to be such an incident of mortgage

foreclosure that it may be supported by a general prayer for relief.”). This prevents the defendant from effectively asserting legal or affirmative defenses to what amounts to an action on an unsecured note.

b. Respondents plead that a “scrivener’s error” justified reforming the mortgage. A “scrivener's error” is defined as a “clerical error”: “*clerical error*. An error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination. • Among the boundless examples of clerical errors are omitting an appendix from a document; typing an incorrect number; mistranscribing a word; and failing to log a call.” (Emphasis added.) Black's Law Dictionary 563 (7th ed. 1999).” Gray v. National, 354 Ill. App.3d 345, 370, 820 N.E.2d 943 (2005); and see Schaffner v. 514 West Grant Place Condo, 324 Ill. App.3d 1033, 1042, 756 N.E.2d 854 (2001), stating, “Lacking a clear definition of “scrivener's error,” we look elsewhere. A “scrivener” is “A writer; esp., a professional drafter of contracts or other documents.” Black's Law Dictionary 1349 (7th ed. 1999). A “scrivener's error” is defined as a “clerical error”: “*clerical error*. An error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination. Among the boundless examples of clerical errors are omitting an appendix from a document; typing an incorrect number; mistranscribing a word; and failing to log a call.” (Emphasis added.) Black's Law Dictionary 563 (7th ed. 1999).” However, the Court’s opinion treated the issue as one of “mutual mistake.” We submit this was error.

Appellants would respectfully request a rehearing on the above points and ask this Court to hold that the trial court committed error in allowing for a reformation of the

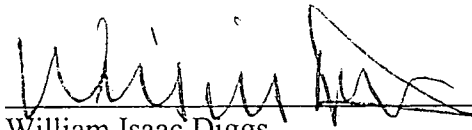
mortgage and a deficiency judgment as against the Appellants in a single action absent any action on the underlying note at issue.

CONCLUSION

Appellants respectfully request that the petition for re-hearing be granted and that the trial court's order be reversed so as to not allow for a reformation of the mortgage and to disallow a deficiency judgment against the Appellants.

Respectfully submitted,

LAW OFFICES OF WILLIAM ISAAC DIGGS

A handwritten signature in dark ink, appearing to read 'William Isaac Diggs', is written over a horizontal line.

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ATTORNEYS FOR APPELLANTS

This 16th day of November, 2012
Myrtle Beach, South Carolina

The South Carolina Court of Appeals

Fidelity Bank, Respondent,

v.

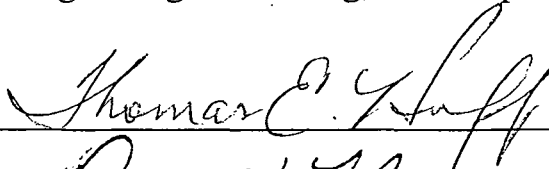
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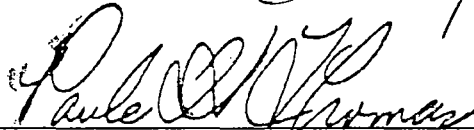
Appellate Case No. 2011-201006

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded. Hence, there is no basis for granting a rehearing, and the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

William Isaac Diggs

Shaun C. Blake

FILED

December 20, 2012