

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM YORK COUNTY  
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2009-CP-46-1673

Yadkin Valley Bank & Trust, ..... Respondent,

v.

Oaktree Homes, Inc.; Dawne M. Ras and  
Thomas C. Ras; Daniel Simpson; Above  
All Services, Inc.; Carter Lumber Company;  
Efficient Painting Contractors, Inc.; Creative  
Concepts; and Solid As A Rock, Inc., ..... Defendants,

Of Which

Oaktree Homes, Inc. is the ..... Appellant.

FINAL BRIEF OF RESPONDENT

James W. Sheedy, S.C. Bar No. 5052  
Susan E. Driscoll, S.C. Bar No. 71447  
Driscoll Sheedy, P.A.  
11520 N. Community House Road  
Suite 200  
Charlotte, N.C. 28277  
(704) 341-2101 - Telephone  
(704) 341-2015 - Facsimile  
jimsheedy@driscollsheedy.com  
sdriscoll@driscollsheedy.com

Attorneys for Respondent

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## STATEMENT OF THE FACTS

In Respondent's foreclosure action, Appellant counterclaimed<sup>1</sup> that it had an alleged commitment from Respondent to finance the acquisition of fifty-one lots from Har-Lee, LLC. (Answer to Amended Complaint and Counterclaim, R. pp. 87-89, ¶¶ 45-79.) Appellant entered into a contract to purchase fifty-one lots in the Palm Tree Cove subdivision from Har-Lee, LLC for \$4.44 million. (R. pp. 333-35.) The contract did not contain any financing contingencies and required Appellant to close on the purchase of the lots regardless of whether or not it had secured financing. (R. pp. 334-35.) Appellant then entered into a second contract to sell the same fifty-one lots to Palmetto Investment Holdings, LLC (PIH) for \$6.697 million. (R. p. 336.)

After signing both contracts, Appellant approached Respondent to finance a portion of the initial purchase price of the fifty-one lots. (R. p. 88, ¶ 64.) Appellant says that it saw a written loan commitment for the fifty-one lot transaction signed by it and Respondent, which contained handwritten changes, that was taken by Respondent to be re-typed and signed by Appellant and Respondent at closing. (R. pp. 330-31, 340-41.) Appellant never saw the written loan commitment again. (R. pp. 330, 340.) Appellant's principal, Tom Ras, testified that he kept a copy of the marked-up commitment which he forwarded to Bill Hargrove (Har-Lee), and either Tom or Bill lost the alleged commitment. (R. p. 330.) Appellant has not produced, nor can it locate, a signed copy of this alleged commitment letter. (R. pp. 328, 341.) Respondent denies that any loan commitment for the fifty-one lot transaction was ever

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<sup>1</sup> Although Appellant lodged six counterclaims against Respondent, Appellant is only appealing the dismissal of two of those counterclaims, breach of contract and negligent misrepresentation.

prepared, much less signed, by it. (R. pp. 273-74, 277-78, 279, 281.)

Nor can Appellant produce a loan commitment for the remainder of the initial purchase price of the fifty-one lots. Even if Respondent had agreed to fund \$3.8 million as alleged, Appellant still needed about \$600,000 in order to close on its acquisition from Har-Lee. (R. p. 337.) There is no question Appellant sought a bridge loan from Bank of York to cover the difference, but did not have a signed loan commitment. (R. p. 337, 343.) Without an additional \$600,000 in financing over and above the loan sought from Respondent, Appellant could not close on its purchase of the fifty-one lots.

Assuming, *arguendo*, Appellant had two enforceable commitments for the entire amount of the purchase price for the fifty-one lots, of which there is no evidence, Appellant suffered no damages because its purchaser, PIH, did not have \$6,697,000 to buy the fifty-one lots from Appellant. (R. pp. 283-87, 290.) The evidence shows that in May 2008, PIH did not have \$6.697 million and could not fund its purchase of the fifty-one lots from Appellant. (R. pp. 283-87, 290.)

After Respondent declined the opportunity to finance a portion of the acquisition of the fifty-one lots in Palm Tree Cove Phase II from Har-Lee, Appellant applied for and received a loan commitment dated July 22, 2008 from Respondent for eleven of the fifty-one lots. This July 22, 2008 loan commitment did not contain any promise or agreement to loan any other sums for acquisition of more lots in Palm Tree Cove Phase II. Har-Lee apparently consented to the transfer of the eleven lots to Appellant.

Appellant executed the note and mortgage addressed in the July 22, 2008 loan commitment. The mortgage states: "This Mortgage, together with any Related Documents,

constitutes the **entire** understanding and agreement of the parties as to the matters set forth in this Mortgage.” The term “Related Documents” is defined in the mortgage to be the note pursuant to which Respondent loaned funds to Appellant for the acquisition of the eleven lots in Phase 2. Appellant admitted the terms of the mortgage. (R. p. 85, ¶9).

When Appellant could no longer fund its payment obligations to Respondent on four loan transactions (including the July 22, 2008 loan), Respondent brought a foreclosure action, seeking to enforce its rights under the various loan documents. In response, Appellant lodged its counterclaims over the separate fifty-one lot transaction.

## ARGUMENT

### Standard of Review

This appeal is from the Order Granting Summary Judgment on the Counterclaims filed July 20, 2011. “An appellate court reviews a grant of summary judgment under the same standard required of the circuit court under Rule 56(c), SCRPC.” *Bass v. Gopal, Inc.*, 395 S.C. 129,133, 716 S.E.2d 910, 912 (2011) (Upholding grant of summary judgment after applying scintilla of evidence test in *Hancock v. Mid-South Mgmt Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).). “[S]ummary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Sides v. Greenville Hospital System*, 362 S.C. 250, 254, 607 S.E.2d 362, 364 (Ct. App. 2004).

**I. The trial court was correct in its holding that there was no enforceable loan commitment to fund the purchase of the fifty-one lots.**

S.C. Code Ann. § 37-10-107(1)(c) (1991) (the “Lender Statute of Frauds”) requires that “the party seeking to maintain the action or defense [must] have received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.” It is indisputable that Appellant does not have a writing signed by Respondent. All of Appellant’s arguments hinge on why it should not have to produce a writing, and on why it is sufficient to just allegedly see a draft of a writing. These arguments ignore the plain language of the Statute imposing requirements in addition to those existing under the common law and the general Statute of Frauds.

In *Sea Cove Development, LLC v. Harbourside Community Bank*, 387 S.C. 95, 691 S.E.2d 158 (2010), our Supreme Court considered whether loan pre-qualification letters satisfied the writing requirement of § 37-10-107 and concluded such letters did not. The loan applicants asserted all of the letters from the lender constituted a signed writing in satisfaction of the Statute or, at the very least, created a jury question. The trial and appellate courts ruled that applicants did not have final loan approval. By Appellant's own testimony, it had at most a marked-up loan commitment to be re-typed and signed at closing. This is not a final loan commitment. Testimony about the purported former possession of a rejected commitment still being negotiated does not satisfy the Statute.

Appellant wishes to go to a jury without any signed writing and just testimony that at one time it at least saw a signed writing. In granting summary judgment, Judge Hayes set forth four compelling reasons why Appellant cannot circumvent the Best Evidence Rule (Rule 1002, SCRE) and offer secondary evidence (Rule 1004, SCRE) consisting of testimony from its principals that a draft of the proposed loan commitment once existed; and, therefore, an inference can be drawn that if no one has the letter, it must have been lost or destroyed.

First, there are no cases under the Lender Statute of Frauds upholding that the requirement of a writing may be circumvented through testimony, which is the very reason for the Statute in the first place, *viz.*, to avoid unwritten loans. Without the requirement of a writing, anyone could swear they had a loan, its payment terms, interest rate, maturity date and other terms favorable to the swearing party.

Second, Appellant has no South Carolina law to support its position under the general Statute of Frauds (S.C. Code Ann. § 32-3-10 (1962)) either. Under South Carolina law,

"[e]very essential element of a contract falling under the statute of frauds must be proved by writing." *Woodruff Oil & Fertilizer Co. v. Portsmouth Cotton Oil Refining Corp.*, 246 F. 375, 377 (4th Cir. 1917). "The statute of frauds, intended to prevent imposition by one man imputing to another a sale on parol testimony, would be nullified by mere circuitry if a party materially interested in making a purchase were allowed to prove by parol [evidence] that he was authorized to sign the name of the seller, and that the seller knew of his adverse interest." *Id.* The requirement of a signed writing, for example, to hold a guarantor liable for another's debt, cannot be avoided by oral testimony to the effect that there was once a written guaranty. "The Statute of Frauds was not enacted to . . . supply a cloak of immunity to hedging litigants lacking integrity," but it "was intended to guard against the perils of perjury and error in the spoken word." 10 Williston on Contracts § 29:4 (4<sup>th</sup> ed.). For Appellant to obligate Respondent to make a loan for \$3.8 million, Appellant has to produce the writing signed by Respondent to which it should be held responsible.

Third, South Carolina decisional law allowing for secondary evidence (Rule 1002, SCRE) does not suggest the statutory requirement of a writing may be displaced by oral testimony that the writing has been lost. Instead, the cases allow secondary evidence such as copies of a writing or a writing produced from review of other records, or testimony to interpret the writing that has been offered into evidence. E.g., *Pee Dee Prod. Credit Ass'n. v. Love*, 284 S.C. 371, 326 S.E.2d 650 (1984) (issue was whether signature on note was authentic). Where secondary evidence has been offered as to a lost writing, our Supreme Court rejected testimony that "I had this in my possession one time and turned it over to a lawyer and I don't know what he did with it." *Windham v. Lloyd*, 253 S.C. 568, 572, 172

S.E.2d 117, 119 (1970).<sup>2</sup> It is unavailing to Appellant that Tom or Bill lost the alleged commitment.

Fourth, the Lender Statute of Frauds says, “the party seeking to maintain the action or defense [must] have received a writing from the party to be charged.” South Carolina Code § 37-10-107(1)(c). Appellant interprets this language to mean that so long as its principal once saw the alleged draft commitment letter, Appellant received a writing sufficient to meet the Statute’s requirements. Through the testimony of its principals, Appellant admitted the letter was taken back by the loan officer to be re-typed. (R. pp. 330-31, 340-41.) Under the Statute, the language “received a writing” is a delivery requirement “intended to preclude lawsuits based on personal notes, confidential memoranda, or drafts, all of which have been signed by the party to be charged and which may come to light as a result of the discovery process.” See John L. Culhane, Jr., *Lender Liability Limitation Amendments to State Statutes of Frauds*, 45 Bus. Law 1779, 1795 (1990), cited with approval in *Harbourside* at 691 S.E.2d at 163. Appellant never received a document intended as a final commitment.

Construing the evidence in favor of Appellant (for Respondent denies the self-serving allegations of Appellant), Respondent emphasizes that Appellant did not have a final loan commitment delivered to it. Whatever Appellant allegedly saw it admittedly rejected. Appellant and Respondent agreed the alleged draft letter would have to be re-typed and re-signed. These are Appellant’s assertions. Appellant never received a final loan commitment

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<sup>2</sup> In *Windham*, our Supreme Court ruled there was no abuse of discretion on the part of the trial court in excluding the secondary evidence based on “the very meager information offered by the appellant as to the whereabouts” of the original document. *Windham*, 253 S.C. at 573, 172 S.E.2d at 119. Appellant’s information as to the location of the alleged commitment letter is just as weak. As in *Windham*, the trial court was correct in refusing to consider secondary evidence of the phantom document.

signed by Respondent. There is no basis under South Carolina law for displacing this requirement.

**II. The trial court was correct in its holding that even if there were an enforceable loan commitment to fund the purchase of the fifty-one lots, Respondent's subsequent financing of the purchase of eleven of those lots operated to extinguish any prior agreement between Appellant and Respondent.**

“Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions.” *Midland Mutual Life Insurance Company v. Harrell*, 331 S.C. 394, 503 S.E.2d 189 (Ct. App. 1999). In *Midland*, the Court upheld summary judgment in favor of the lender on the grounds that the parties' signatures on loan documents superceded any prior oral agreements related to the loan transaction.

Here, Appellants cannot produce a written commitment to lend \$3.8 million for the purchase of the fifty-one lots. They allege there were discussions about a written commitment with an employee of Respondent, but they cannot produce a copy of the final or even draft document. This Court can only consider the outward expressions of Appellant and Respondent. Those outward expressions were set forth in the \$1.305 million loan transaction that funded Appellant's purchase of eleven of the fifty-one lots in Palm Tree Court, Phase II. Appellant accepted funding for eleven lots to be sold to individual buyers, not PIH. Har-Lee apparently consented to Appellant buying eleven instead of fifty-one lots. Appellant's acceptance of this funding eliminated its ability to purchase and sell all fifty-one lots to PIH as alleged in the Counterclaim.<sup>3</sup> Appellant's acceptance of this funding also eliminated its

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<sup>3</sup> In its brief, Appellant claims this was an attempt to “mitigate its damages”. (Initial Brief of Appellant, p. 15.) Appellant risked such damages to Har-Lee when it signed this contract without a financing contingency and before it had any loan commitment. Even if Appellant was lessening Har-Lee's claim

need to borrow \$4.44 million, \$3.8 million from Respondent and \$600,000 from the Bank of York. This is plainly evident on the face of the \$1.305 million transaction. Further, Appellant signed a mortgage reciting that the loan documents for the \$1.305 million transaction constituted the entire agreement between Appellant and Respondent.<sup>4</sup>

Upon Appellant's execution of the \$1.305 million loan documents, Har-Lee, Appellant and PIH could no longer perform pursuant to the contracts for the sale of the fifty-one lots. The fifty-one lot deal *could not close*. Whatever rights or interests Appellant may have had in or to a \$3.8 million loan from Respondent to fund *part* of the acquisition of fifty-one lots from Har-Lee were extinguished at the closing of the \$1.305 million loan. The trial court's ruling that the \$1.305 million loan superceded any alleged obligation on the part of Respondent to fund a \$3.8 million loan to Appellant should be upheld.

**III. The trial court was correct in its holding that Appellant's sole remedy for Respondent's failure to honor the alleged loan commitment was through an action for breach of contract, and did not sound in tort.**

When a party performs "in such a way that he violates a contractual duty *only*, then his liability is only contractual." *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C.

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against Appellant, it did nothing to reserve any claims against Respondent. Appellant entered into a novation substituting the \$1.305 million loan documents in the place of any alleged \$3.8 million commitment. Further, it is apparent Har-Lee consented to sell eleven lots and did not hold Appellant to purchasing fifty-one lots. As for PIH, it did not have the money to fund its purchase of the fifty-one lots. PIH has never lodged any claim against Appellant.

<sup>4</sup> Resort to extrinsic evidence of the intent of the parties is appropriate where an ambiguity exists on the face of the document. Under contract law, "[t]o ascertain the intention of an instrument resort is first to be had to its language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument." *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973), *cited in Super Duper Inc. v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 385 S.C. 201, 683 S.E.2d 792 (2009). The \$1.305 million loan, the Har-Lee and PIH contracts are not ambiguous. It is not as Appellant suggests a jury question whether the fifty-one lot transaction could be consummated after the \$1.305 million loan closed.

335, 345, 384 S.E.2d 730, 737 (1989). Thus, “[a] breach of duty which arises under the provisions of a contract between the parties *must be redressed under contract, and a tort action will not lie.*” *Koontz v. Thomas*, 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999) (emphasis added), quoting *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54-55, 463 S.E.2d 85, 88 (1995). See also *Foxfire Village, Inc. v. Black & Veatch, Inc.*, 304 S.C. 366, 404 S.E.2d 912, 917 (Ct. App. 1991) (“Where the cause of action is predicated on an alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie.”). This “rule maintains the dividing line between tort and contract. . .” *Tommy L. Griffin*, 320 S.C. at 54, 463 S.E.2d at 88. “Contract law seeks to protect the expectancy interests of the parties. Tort law, on the other hand, seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property.” *Sapp v. Ford Motor Co.*, 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009).

All evidence in this case relates solely to the alleged prospective lending relationship, with no evidence of any other duty<sup>5</sup> on the part of Respondent. As a result, any such alleged duty arises in contract and cannot also form the basis for a tort. Respondent had no duty to Appellant that arose outside of the alleged loan commitment. If Appellant proves such an

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<sup>5</sup> Appellant tries to distract the Court by citing *Evans v. Rite Aid Corp.*, 324 S.C. 269, 478 S.E.2d 846 (1996). Rather than support Appellant’s counterclaim for negligent misrepresentation, *Evans* is directly contrary. In *Evans*, the court ruled there was no reliance on the part of Evans. The same is true in this case. The contract with Har-Lee was executed by Appellant without any financing contingency and Appellant approached Respondent for financing after execution of the contract. (R. pp. 294-95, 333-35.) In signing the contract, Appellant could not have relied on any representations from Respondent, because the contract was signed prior to Appellant seeking financing. Further, Respondent did not have a financial or pecuniary interest in the contract between Har-Lee and Appellant. Respondent would not profit from that contract in any way.

alleged valid commitment exists (which it cannot do), it could proceed with its counterclaim for breach of contract. But, Appellant cannot pursue any tort claims against Respondent because there is no tort duty. The trial court correctly dismissed Appellant's counterclaim for negligent misrepresentation.

**IV. The trial court was correct in its ruling that by asserting permissive counterclaims in an equitable action, Appellant waived its right to a trial by jury.**

In *C & S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 301, 350 S.E.2d 191, 193 (1986), our Supreme Court “summarize[d] the proper analysis for determining the trial of issues raised by counterclaim and [] set out the procedure to be followed when issues are to be tried before a jury.” Under the holding in *C&S*, “[i]f the complaint is equitable and the counterclaim legal and permissive, the defendant waives his right to a jury trial.” *Id.* at 302, 350 S.E.2d at 193. When a defendant brings a legal and permissive counterclaim in an equitable action, that defendant loses its right to a jury trial on those permissive counterclaims. Under Rule 13(b), SCRC, a permissive counterclaim is defined as a claim “not arising out of the transaction or occurrence that is the subject matter of the opposing party’s claim.”

“By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party’s claim.” *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 61, 566 S.E.2d 863, 865 (Ct. App. 2002). “The test for determining if a counterclaim is compulsory is whether there is a ‘logical relationship’ between the claim and the counterclaim.” *Id.* Applying this test in the foreclosure context in *North Carolina Federal Sav. and Loan Ass’n v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903 (1989), our Supreme

Court ruled that a logical relationship did not exist between the enforceability of the note at issue in the foreclosure and a counterclaim based on an alleged agreement that NC Federal “would purchase DAV’s interest in the joint venture.” DAV’s counterclaim did not “affect the enforceability of the note” and, as a result, was held to be permissive. *Id.*

This Court applied the same reasoning in *Wells Fargo Bank, N.A. v. Smith*, 398 S.C. 487, 730 S.E.2d 382 (Ct. App. 2012). In *Smith*, this Court held that the borrower’s counterclaim was permissive “because a violation of the Attorney preference statute would not affect the enforceability of the Note and Mortgage.” *Id.* at 498, 730 S.E.2d at 334. Review of the statute in question “demonstrate[d] Smith’s counterclaim has no ‘logical relationship’ to the enforceability of the Note and Mortgage.” *Id.* at 499, 730 S.E.2d at 334. Even more importantly, the preference statute only allowed for the recovery of actual damages and a possible penalty against Wells Fargo, but it did “not permit rescission of the Note and Mortgage.” *Id.* As a result, the counterclaim was permissive and “Smith waived his right to a jury trial by asserting it in the foreclosure action.” *Id.*

The factual basis for Appellant’s counterclaims is an agreement wholly separate and distinct from and extrinsic to the loan transactions at issue in the foreclosure action. The principals of Appellant admitted the same in deposition testimony and through affidavits.

Q: There are certain loans that OakTree has at American Community Bank which are in default and the subject of foreclosure?

A: That is correct.

Q: The commitment that you described in May had nothing to do with those loans?

A: No.

Q: It was completely separate as financing?

A: Correct.

(R. p. 338.) The May 16, 2011 Affidavit of Dawne Ras also states that the alleged loan commitment was a separate transaction and had nothing to do with the other four loans. (R. p. 382, ¶4.)

Nothing that Respondent did or did not do in relation to this request for financing on a wholly separate transaction would have any impact on the enforceability of the notes and mortgages at issue in the foreclosure action. Appellant did not seek to rescind any of these notes, nor did it appeal the order allowing the foreclosure to go forward. Appellant would only be entitled to damages set off against the \$1.5 million foreclosure deficiency in the event it succeeds on its counterclaims, not rescission of any of the notes or mortgages.<sup>6</sup> The trial court's ruling that Appellant waived its right to a jury trial by asserting permissive counterclaims in the foreclosure action should be upheld.

**V. The trial court was correct in its denial of Appellant's motion for sanctions.**

The longstanding South Carolina jurisprudence regarding the appellate review of a motion for sanctions is that a "trial court's rulings on discovery matters will not be reversed on appeal absent a clear abuse of discretion." *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 220, 493 S.E.2d 826, 836 (1997) (Citations omitted.). The abuse of discretion standard does not allow the trial court's decision on whether to award sanctions to be "disturbed on

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<sup>6</sup> Appellant's constant repetition of the phrase "logical relationship" overlooks the rulings in both *DAV* and *Smith*. To show a logical relationship in the lending context, there has to be an impact on the notes and mortgages at issue in the foreclosure. Appellants cannot demonstrate any such impact.

appeal unless the decision is controlled by an error of law<sup>7</sup> or is based on unsupported factual conclusions.” *Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC*, 394 S.C. 97, 104, 713 S.E.2d 650, 654 (Ct. App. 2011) (Finding no abuse of discretion in trial court’s refusal to award sanctions.)

The basis for Appellant’s motion for sanctions is the allegation that Respondent may have destroyed the alleged draft loan commitment. The trial court’s decision *not* to award sanctions was rooted in the facts presented at the hearing. It is undisputed that Appellant, not Respondent, lost or destroyed a copy of the alleged draft. (R. p. 330.) There is no evidence in the record that Respondent ever had a final or draft loan commitment, much less destroyed it. Walter Joyce, Respondent’s current IT director, testified that “I haven’t found any evidence to lead me to believe that any data had been deleted.” (R. p. 313.) He went on to say that the reason he knew nothing had been deleted is “we don’t delete anything in that archive,” referring to the e-mail archive of Respondent. (R. p. 314.) In fact “everything that’s been put in that [e-mail] archive is still in that archive.” (R. p. 315.)<sup>8</sup>

Appellant has no facts to support that Respondent, first, had a letter and then destroyed it. The purported draft could not have been deleted, because it never existed. All of Respondent’s employees testified that no such loan commitment existed. (R. p. 275-78, 281, 292-93.) Appellant cannot produce anything to suggest the existence of such a draft

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<sup>7</sup> Appellant does not allege an error of law, but seeks reversal only on the grounds of unsupported factual conclusions.

<sup>8</sup> Mr. Joyce came to Respondent on November 2, 2009, seven months after this litigation began. (R. p. 317.) He testified that he had no “knowledge about anything that happened in American Community Bank’s environment” or Yadkin Valley Bank and Trust prior to November 2, 2009 “because [he] wasn’t there”. (R. p. 318.) Despite being provided with the name of Mr. Joyce’s predecessor and others in the IT department of Respondent, Appellant did not seek to depose any of them. The only evidence in the record comes from Mr. Joyce and he testified explicitly that he did not see any evidence of *any* data being deleted.

commitment. (R. p. 330.) The only evidence presented was the lack of evidence of any destruction of data by Respondent. Likewise, there was no evidence of any wrongdoing by Respondent. There was no abuse of discretion on the part of the trial court. As a result, the denial of Appellant's motion for sanctions should be upheld.<sup>9</sup>

### CONCLUSION

Appellant never received a final loan commitment signed by Respondent. Thus, Appellant's breach of contract and negligent misrepresentation claims are barred by the Lender Statute of Frauds. Even if there were an enforceable loan commitment to fund the purchase of the fifty-one lots (which there was not), Respondent's subsequent financing of the purchase of eleven of those lots operated to supercede any prior agreement between Appellant and Respondent. Appellant and Respondent just had a lending relationship. Appellant's only duty to Respondent sounded in contract. Appellant's sole remedy for Respondent's failure to honor an alleged loan commitment was through an action for breach of contract, not for any tort such as negligent misrepresentation. Appellant's counterclaims related to a separate alleged loan commitment, so they were permissive. Appellant had no right to a jury trial. There was no abuse of discretion by the trial court in denying Appellant's motion for sanctions. The factual basis for the denial was well supported by the evidence. By its own testimony, Appellant (not Respondent) lost the alleged draft loan commitment. Any information of Respondent was backed up on its servers. There is no evidence that Respondent destroyed the alleged draft loan commitment. Respondent's inability to produce

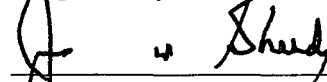
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<sup>9</sup> If Appellant thought summary judgment was premature, at the hearing Appellant should have availed itself of Rule 56(f), SCRCP, which it did not do. Appellant could have also sought to extend the dispositive motions deadline in the scheduling order, which Appellant did not do.

the alleged loan commitment supposedly signed by it was because such commitment did not exist.

Date: 3/7/13

Respectfully submitted,



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James W. Sheedy, S.C. Bar No. 5052  
Susan E. Driscoll, S.C. Bar No. 71447  
Driscoll Sheedy, P.A.  
11520 N. Community House Road  
Suite 200  
Charlotte, N.C. 28277  
(704) 341-2101 - Telephone  
(704) 341-2015 - Facsimile  
jimsheedy@driscollsheedy.com  
sdriscoll@driscollsheedy.com

Attorneys for Respondent

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM YORK COUNTY  
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

---

Case No. 2009-CP-46-1673

---

Yadkin Valley Bank & Trust, ..... Respondent,

v.

Oaktree Homes, Inc.; Dawne M. Ras and  
Thomas C. Ras; Daniel Simpson; Above  
All Services, Inc.; Carter Lumber Company;  
Efficient Painting Contractors, Inc.; Creative  
Concepts; and Solid As A Rock, Inc., ..... Defendants,

Of Which

Oaktree Homes, Inc. is the ..... Appellant.

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CERTIFICATE OF COMPLIANCE

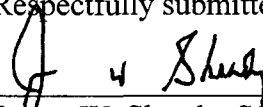
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The undersigned hereby certifies that the *Final Brief of Respondent* complies with  
Rule 211(b), SCACR.

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**SC Court of Appeals**

Date: 3/7/13

Respectfully submitted,



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James W. Sheedy, S/C. Bar No. 5052  
Susan E. Driscoll, S.C. Bar No. 71447  
Driscoll Sheedy, P.A.  
11520 N. Community House Road  
Suite 200  
Charlotte, N.C. 28277  
(704) 341-2101 - Telephone  
(704) 341-2015 - Facsimile  
jimsheedy@driscollsheedy.com  
sdriscoll@driscollsheedy.com

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Of Which

Oaktree Homes, Inc. is the ..... Appellant.

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that on the date indicated below he served counsel for Appellant with copies of the *Final Brief of Respondent* by mailing a copy of the same via First Class, U.S. Mail, postage-paid on the date set forth below.

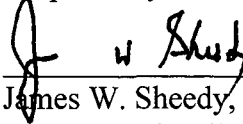
John S. Nichols, Esq.  
Blake A. Hewitt, Esq.  
Bluestein, Nichols, Thompson & Delgado, LLC  
P.O. Box 7965  
Columbia, SC 29202

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William A. McKinnon, Esq.  
Chad McGowan, Esq.  
McGowan, Hood & Felder, LLC  
1539 Health Care Drive  
Rock Hill, SC 29732

Date: 3/7/13

Respectfully submitted,



---

James W. Sheedy, S.C. Bar No. 5052  
Susan E. Driscoll, S.C. Bar No. 71447  
Driscoll Sheedy, P.A.  
11520 N. Community House Road  
Suite 200  
Charlotte, N.C. 28277  
(704) 341-2101 - Telephone  
(704) 341-2015 - Facsimile  
jimsheedy@driscollsheedy.com  
sdriscoll@driscollsheedy.com

Attorneys for Respondent

# Driscoll SHEEDY

A PROFESSIONAL ASSOCIATION | ATTORNEYS AT LAW

James W. Sheedy  
Lic. in NC & SC  
Direct: 704 341 2102  
Fax: 704 341 2105  
jimsheedy@driscollsheedy.com

Ballantyne: 11520 N. Community House Road  
Suite 200 | Charlotte, NC 28277  
South Carolina Office: 222 E. Main Street  
Suite 204 | Rock Hill, SC 29730  
www.driscollsheedy.com

March 7, 2013

Honorable Jenny Abbot Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, S.C. 29201

**Re: Yadkin Valley Bank & Trust v. Oaktree Homes, Inc. et al.**  
**C.A. No.: 2009-CP-46-1673**  
**Appellate Case No.: 2011-197970**

Dear Ms. Kitchings:


Enclosed please find sixteen copies (fifteen bound and one unbound) of the Final Brief of Respondent and the originals and corresponding copies of a Certificate of Compliance and a Certificate of Service in the above referenced matter. Please file the originals with the records of your office and return clocked copies to me in the enclosed envelope.

By copy of this letter, I am serving copies of the above referenced documents on counsel for Appellant.

With kindest regards, I remain

Respectfully,

DRISCOLL SHEEDY, P.A.

  
James W. Sheedy

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Honorable Jenny Abbot Kitchings  
March 7, 2013  
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cc: Danny Hunter  
Blake A. Hewitt, Esq.  
John S. Nichols, III, Esq.  
William A. McKinnon, Esq.  
Chad McGowan, Esq.