THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity and Special Circuit Court Judge

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Case No. 10-CP-23-10047

TD Bank National Association, Successor by Merger to Carolina First Bank, Respondent,

v.

Copper Lakes, LLC f/k/a Tall Pines Investments, LLC; Grande Dunes Development Company, LLC; and Silver Real Estate Fund I., L.P. Defendants,

of whom

Silver Real Estate Fund I., L.P. is Appellant.

FINAL BRIEF OF RESPONDENT TD BANK NATIONAL ASSOCIATION, SUCCESSOR BY MERGER TO CAROLINA FIRST BANK

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STATEMENT OF THE CASE

In July 2007, Defendant Copper Lakes, LLC f/k/a Tall Pines Investments, LLC ("**Copper Lakes**" or the "**Borrower**") borrowed $12,024,124.00 ("**the Loan**") from Respondent TD Bank National Association, Successor by Merger to Carolina First Bank ("**TD Bank**" or the "**Bank**"), and executed a promissory note in favor of the Bank reflecting this original principal amount ("**the Note**"). (R. p. 11, ¶ 7.) Defendant Grande Dunes Development Company, LLC ("**Grande Dunes**") and Appellant Silver Real Estate Fund I., L.P. ("**Silver**") guaranteed the Loan, and both executed a Guaranty Agreement in favor of the Bank. (R. pp. 11-12, ¶¶ 9-10.) As additional security for its obligations to the Bank, Copper Lakes gave TD Bank a mortgage ("**the Mortgage**"), which encumbers: (1) certain real property located in Greenville South Carolina ("**the Real Property**"); (2) all personal property located on the Real Property; (3) all fixtures located on the Real Property, and (4) certain other rights with respect to the Real Property. (R. pp. 12-13, ¶ 11.)

The Note matured on July 31, 2010, and all of Copper Lakes' obligations became immediately due and payable to TD Bank. (R. p. 13, ¶ 14.) However, Copper Lakes failed to pay these obligations and subsequently defaulted under the Note. (R. pp. 13-14, ¶¶ 15-16.) Copper Lake's default under the Note also constituted a default under the Mortgage and Grande Dunes' and Silver's Guaranty Agreements. (Id.) Consequently, in December 2010, TD Bank filed the underlying action against Copper Lakes, Grande Dunes, and Silver. TD Bank's lawsuit is comprised of two claims: (1) a foreclosure claim against Copper Lakes and (2) a deficiency claim against Grande Dunes and Silver.

All parties answered TD Bank's foreclosure Complaint. Significantly, Silver, which filed an Answer and an Amended Answer, largely did not dispute the allegations

in the Complaint, nor did it plead any counterclaims or cross-claims against its co-defendants that would necessitate a jury trial. (R. pp. 128-31.) Accordingly, pursuant to Rule 53 of the South Carolina Rules of Civil Procedure, TD Bank requested that the Clerk of Court refer the case to the Master-in-Equity. (R. pp. 154-58.) On October 17, 2011, the Clerk of Court granted this request and, pursuant to an Order of Reference, referred this foreclosure case to the Greenville County Master-in-Equity, the Honorable Charles B. Simmons, Jr. (R. pp. 1-2.)

Subsequently, TD Bank, after settling its claim against Grande Dunes, moved Judge Simmons to dismiss Grande Dunes without prejudice from the case. Although Silver does not have any cross-claims against Grande Dunes, it refused to consent to this dismissal. However, on October 21, 2011, Judge Simmons granted the motion and dismissed Grande Dunes without prejudice, finding that such dismissal was appropriate given TD Bank's settlement with Grande Dunes and the fact that "no parties have any pending claims against Grande Dunes." (R. p. 4.)

Shortly thereafter, Silver moved Judge Simmons to vacate the Order of Reference, claiming that it is entitled to a jury trial on TD Bank's claim for a deficiency judgment against it. (R. pp. 163-66.) Additionally, Silver moved to vacate the Order Dismissing Grande Dunes, contending that the court lacked the authority to issue it because it was inappropriate for the Clerk of Court to refer the case to the Master-in-Equity. (R. pp. 167-72.) Neither Copper Lakes nor Grande Dunes objected to or moved to vacate the Order of Reference.

After a hearing and consideration of the parties' memoranda, Judge Simmons, sitting as Master-in-Equity and Special Circuit Court Judge, denied Silver's Motion to Vacate the Order of Reference. (R. pp. 6-8.) Although Judge Simmons recognized that a

third-party guarantor in a foreclosure case could have "legitimate jury defenses or [could bring] other claims entitling it to a right to a trial by jury that should not be referred under Rule 53," he held that Silver, in its Answer and Amended Answer, did not plead such defenses or claims. (R. p. 7.) Specifically, he found that Silver failed to assert "any legal claims against TD Bank or any other party that would allow or necessitate a trial by jury." (Id.) As a result, Judge Simmons determined that, "[i]n light of the posture of the pleadings of Silver," "even had the case not been referred by the Clerk of Court, reference would otherwise have been appropriate." (Id.) Based on the holding that the reference was appropriate, Judge Simmons also denied Silver's Motion to Vacate the Order Dismissing Grande Dunes. (Id.)

On February 22, 2012, Silver moved Judge Simmons to reconsider the February 7, 2012, Order. (R. pp. 202-07.) The court denied this motion as well, finding that there was "no basis to alter or amend the Order dated February 10, 2012" (R. p. 9), and it subsequently scheduled a foreclosure hearing. (R. pp. 208-09.)

Shortly before the foreclosure hearing, Silver appealed both the February 10, 2012, and the February 28, 2012, Orders (collectively, "**the Orders**"). As a consequence of Silver's appeal, Judge Simmons stayed the foreclosure hearing "until an order from [the] appellate court." (R. p. 210.)

On March 29, 2012, TD Bank filed with the Court of Appeals a Motion to Dismiss the Appeal or, in the Alternative, to Remand the Foreclosure Claim to the Lower Court for Adjudication, arguing that the Orders are not immediately appealable as they do not deny Silver a mode of trial to which it is entitled as a matter of right. The Court of Appeals granted TD Bank's motion on June 5, 2012, and dismissed the appeal. Following the dismissal of Silver's appeal, the Court of Appeals heard arguments in

Carolina First Bank v. BADD, LLC, 400 S.C. 343, 733 S.E.2d 619 (Ct.App.2012), and Silver filed a Petition for Rehearing. The Court reinstated Silver's appeal on September 28, 2012, and filed its decision in BADD on October 24, 2012,[1] in which it held that a deficiency claim against a guarantor is "separate and distinct from the foreclosure action and [is] legal in nature," entitling the guarantor to a jury trial on the claim. Id. at 347, 733 S.E.2d at 621.

ARGUMENT

I. THE LOWER COURT'S DENIAL OF SILVER'S MOTION TO VACATE THE ORDER OF REFERENCE WAS CORRECT IN LIGHT OF THE PLEADINGS AND SOUTH CAROLINA LAW.

This Court's October 2012 BADD decision does not dictate reversal of the Orders, which the Court instead should uphold because: (1) based on the face of the pleadings and South Carolina law, Silver is not entitled to a jury trial in this foreclosure action in which it has not raised any factual disputes or asserted any claims or defenses that would entitle it to a trial by jury, and (2) the process of referring this case to the Master-in-Equity was appropriate under Rule 53 of the South Carolina Rules of Civil Procedure.

[1] BADD remains on appeal as Carolina First Bank n/k/a TD Bank, N.A. is filing a petition for writ of certiorari with the South Carolina Supreme Court on or before February 21, 2013.

A. The Referral Was Appropriate As the Pleadings in this Case, Unlike Those in *BADD*,[2] Do Not Entitle the Guarantor to a Jury Trial.

The appropriateness of the Orders and the referral of this action to the Master-in-Equity are gleaned from the face of the pleadings themselves and are not dictated by this Court's recent decision in BADD. In BADD, the bank's foreclosure action included a deficiency claim against a guarantor, who disputed the enforceability of the guaranty agreement at issue and asserted several legal counterclaims against the bank. The lower court referred the case to the Master-in-Equity solely on the grounds that the main purpose of the action (to foreclose mortgages on real property) was equitable in nature and the guarantor had waived his right to a jury trial by asserting permissive legal counterclaims therein. The BADD Court determined that the bank's deficiency claim was separate from the underlying foreclosure action, was legal in nature, and entitled the guarantor to a jury trial. Id. at 347, 733 S.E.2d at 621. BADD does not, however, control this case, whose pleadings distinguish it from and place it outside the realm of BADD.

Here, Judge Simmons, sitting as a Special Circuit Court Judge, determined that the reference was appropriate, ***even if the case was not a foreclosure action***, because the "pleadings of Silver" do not "allow or necessitate a trial by jury." (R. p. 7.) In BADD, the bank's deficiency claim against the guarantor involved factual issues as the guarantor disputed the enforceability of the contract. However, as Silver's Amended Answer reveals, there are no such factual issues in dispute regarding the Guaranty Agreement, and, consequently, TD Bank's claim against Silver will only involve a court's interpretation of that agreement. See, e.g., Garrett v. Pilot Life Ins. Co., 241 S.C. 299,

[2] As discussed in Part I(B), TD Bank respectfully requests that the Court reverse BADD.

305, 128 S.E.2d 171, 174-75 (1962) ("As a general rule, contracts are to be construed by the court."). Silver, in its Amended Answer:

- Admits to executing the Guaranty Agreement in favor of the Bank, (R. p. 11, ¶ 6);
- Admits the terms of the Guaranty Agreement control with regard to when the obligations contained therein are triggered, (id.);
- Admits the terms of the Note control with regard to its maturity, (R. p. 12, ¶ 10); and
- Admits Copper Lakes is in default, owing money to TD Bank under the terms of the Note, (R. pp. 12-13, ¶ 11).

Furthermore, unlike the BADD guarantor, ***Silver has asserted no counterclaims or cross-claims*** entitling it to a jury trial. Additionally, neither of Silver's two defenses raises jury issues. As defenses to the Complaint, Silver seeks an equitable accounting and asserts that the Guaranty Agreement only renders it liable for half of Copper Lake's debt to the Bank, an issue of contract interpretation. As South Carolina courts recognize, an accounting "sounds in equity," Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009), and "written contracts" like guaranty agreements, "are to be construed by the Court," Cafe Assocs. v. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991). Thus, even if TD Bank's claim against Silver is legal in nature, Silver is not entitled to a jury trial because, as Judge Simmons, pursuant to his authority to refer cases as a Special Circuit Court Judge and under Rule 53(b), found, there are absolutely no issues involved in the case "that would allow or necessitate a trial by jury." (R. p. 7.) See Rule 53(b), SCRCP ("In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action

in a case").[3] In other words, the complete absence of any factual issues appropriate for determination by a jury distinguishes the case from BADD and defeats any claim by Silver of a right to a jury trial on the face of the pleadings in this particular case.

B. Furthermore, the Referral Was Appropriate Because S.C.Code Ann. § 29-3-660 Does Not Entitle a Third Party Guarantor, Who Has Not Asserted Any Legal Claims or Defenses, to a Jury Trial on a Deficiency Claim.

Although BADD concludes and Silver asserts that a bank's claim against a guarantor is "separate and distinct from [an equitable] foreclosure action," is legal, and entitles the guarantor to a jury trial, these contentions are inconsistent with and undercut by South Carolina's statutory scheme that governs foreclosures.[4] BADD, 400 S.C. at 347, 733 S.E.2d at 621. See, e.g., S.C.Code Ann. § 29-3-660 (2011). Specifically, these arguments contradict S.C.Code Ann. § 29-3-660, a statute which the BADD decision overlooks and does not discuss. This statute unambiguously provides that deficiency claims against third-party guarantors, like the Bank's against Silver, are part and parcel of equitable foreclosure actions and are to be decided by the court. S.C.Code Ann. § 29-3-660 states:

> In actions to foreclose mortgages 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

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[3] Rule 53(c) provides that: "Once referred, the master . . . shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter." See also Rule 53, SCRCP, Note to 1986 Amendments ("Rule 53(c) is amended to make clear that the master has the same powers as a court sitting without a jury unless the order of reference limits his authority.").

[4] For this reason and those discussed in Part I(B), this Court should reverse BADD to the extent it holds that a claim for a deficiency judgment against a guarantor is separate from an equitable foreclosure action and entitles the guarantor to a jury trial as a matter of right.

> shall be personally liable for the debt secured by such mortgage ***and 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.

S.C.Code Ann. § 29-3-660 (2011) (emphasis added). See also Welborn v. Cobb, 92 S.C. 384, 389-90, 75 S.E. 691, 693 (1912) (internal citations omitted) (holding that an action against a third party guarantor and for foreclosure of real property was "on the equity side of the Court"). Pursuant to the statute's language, the South Carolina Legislature has dictated that a deficiency claim against "***any person other than the mortgagor***" is part of a foreclosure action and is to be "adjudge[d]" by the court. S.C.Code Ann. § 29-3-660 (2011) (emphasis added). Thus, a court's authority in an equitable foreclosure action is not just limited to a mortgagor-defendant, but it also extends to third parties who have guaranteed the mortgage debt (unless a legal counterclaim or cross-claim is asserted for which a jury trial would be available). See generally Rule 53, SCRCP, Note to 2002 Amendment ("The 2002 amendment permits referral of foreclosure cases to the master-in-equity by order of the clerk of court. If there are ***counterclaims requiring a jury trial***, any party may file a demand for a jury under Rule 38 and the case will be returned to the circuit court."). This authority is consistent with the general proposition that:

> in the absence of statute construed as otherwise providing, a defendant in a mortgage foreclosure suit has no absolute right to a jury trial of issues of fact bearing upon the plaintiff's right to recover a deficiency judgment against him. The basis of that proposition, as ordinarily laid down, is that a foreclosure suit is one in equity to which the entry of a deficiency judgment is merely incidental, the general rule being that when an equity court takes jurisdiction for one purpose, it will retain it for the purpose of rendering complete relief with reference to the matters in controversy.

112 A.L.R. 1492 Right to Jury Trial of Issues as to Personal Judgment for Deficiency in Suit to Foreclose Mortgage (2011).[5] See also Rule 71(a), SCRCP ("Actions to foreclose liens or obtain partition of real property shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53."); Fed'l Land Bank of Columbia v. Davant, 292 S.C. 172, 178, 355 S.E.2d 293, 296 (Ct.App.1987) ("Section 29-3-660 specifically authorizes the entry of a deficiency judgment when the mortgage debt remains unsatisfied after sale of the mortgaged premises," recognizing that '"a judgment for deficiency is merely incidental to the relief sought in a foreclosure action.'"); Perpetual Bldg. & Loan Asso. v. Braun, 270 S.C. 338, 341, 242 S.E.2d 407, 408 (1978) ("The United States Supreme Court in Shepherd v. Pepper, 133 U.S. 626, 10 S.Ct. 438, 33 L.Ed. 706 (1890), held a decree for a deficiency to be a necessary incident of a foreclosure suit in equity."); Am.Jur. 2d Mortgages § 692 ("[I]n the absence of a statute construed as providing otherwise, a defendant in a mortgage-foreclosure suit has no absolute right to a jury trial of the issues of fact bearing upon the plaintiff's right to recover a deficiency judgment against him or her.").

In an attempt to skirt the unambiguous language of S.C.Code Ann. § 29-3-660, Silver asserts that it is entitled to a jury trial on TD Bank's deficiency claim against it because Rule 38 and the State Constitution guarantee it such a jury trial. Silver's

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[5] See also 55 Am.Jur. 2d Mortgages § 692 ("The constitutional provisions guaranteeing that the right to a trial by jury shall remain inviolate do not give a mortgagor ***or a guarantor*** in a foreclosure suit the right to a jury trial of the issues of fact bearing on the right to a deficiency judgment, and this is notwithstanding that the statute under which the right is denied was adopted after the constitutional provision went into effect. This rule is based upon the proposition that a foreclosure suit is a suit in equity and that, by the rule applicable to equity suits generally, ***there is no right to a jury trial, even though the court, "as incidental to the main relief sought," determines an issue which might have been litigated in a separate action at law.***") (emphasis added).

argument ignores S.C.Code Ann. § 29-3-660's directive that courts should decide deficiency claims and that such claims do not trigger a jury trial.[6] It also overlooks Rule 38's pronouncement that only "***issues of fact*** in an action for the recovery of money" trigger a jury trial, Rule 38(a), SCRCP (emphasis added), and that there is a complete lack of any "issues of fact" in regard to TD Bank's deficiency claim against Silver, supra Part I(A). Furthermore, this argument fails to recognize the fact that South Carolina's Constitution only guarantees the right to a jury trial in instances in which such a right existed at the time of the Constitution's 1868 adoption, Mims Amusement Co. v. S.C. Law., Enforcement Div., 366 S.C. 141, 145, 621 S.E.2d 344, 345-46 (2005), and, at the time of that adoption, a right to a jury trial did not exist in foreclosure actions involving deficiency judgments. Since 1791 – almost a century prior to the enactment of the State Constitution – foreclosure actions seeking deficiency judgments have been consistently found by courts to sound in equity, with no right to a jury trial. Prior to 1791, courts required a mortgagee seeking a deficiency judgment to commence a separate action at law to obtain such a judgment. Perpetual Bldg., 270 S.C. at 341-42, 242 S.E.2d at 409. However, in 1791, the South Carolina Legislature changed "the nature of a mortgage from that of a conveyance on condition to a mere lien," and courts subsequently began granting deficiency judgments in equitable foreclosure actions. Id. See, e.g., Anderson

[6] Silver's argument also overlooks South Carolina courts' long-abidance of the legislative pronouncement that a claim for a deficiency judgment is part of an equitable foreclosure action to be decided by a court. Notably, as far back as 1888, the South Carolina Supreme Court has recognized that deficiency judgments can be granted in equitable foreclosure actions, see Anderson v. Pilgram, 30 S.C. 499, 9 S.E. 587 (1888) as they are an incident of the relief sought in such cases, McConnell, et al. v. Barnes, et al., 142 S.C. 112, 140 S.E. 310 (1927). See also Welborn, 92 S.C. at 389-90, 75 S.E. at 693 (internal citations omitted) (the court, in an action against a borrower and guarantor, remarked that [t]he issues are therefore all equitable in their nature").

(finding that, in this State, an action for foreclosure was a proceeding *in personam* as well as *in rem*, and therefore, a deficiency judgment could be granted in a foreclosure suit sounding in equity). ***Thus, at the time of the adoption of the South Carolina Constitution of 1868, no jury trial right existed in a foreclosure action seeking a deficiency judgment in the same action.***[7]

In short, the Court should uphold the Orders and the referral of this case to the Master-in-Equity because a deficiency claim against a third party guarantor is part of and incident to an equitable foreclosure action, and according to the Legislature's directive in § 29-3-660, courts, not juries, determine such claims when the third party guarantor, like Silver, has not raised any legal claims or defenses that trigger a jury trial, supra Part I(A).

C. The Lower Court's Denial of Silver's Request that It Vacate the Order of Reference Based on an Alleged Failure to Follow the Appropriate Referral Procedure Was Proper as the Process Was in Accordance with Rule 53 of the South Carolina Rules of Civil Procedure.

Not only did the lower court correctly determine that Silver is not entitled to a jury trial on TD Bank's claim for a deficiency judgment, but it also correctly denied Silver's request that it vacate the Clerk of Court's Order of Reference because of an allegedly inappropriate referral process. Silver's protests about the Clerk of Court's

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[7] In support of its constitutional argument, Silver cites in its Brief to Collier v. Green, 244 S.C. 367, 373, 137 S.E.2d 277, 281 (1964), for the proposition that "[t]o the Court belongs all issues of law and all cases in chancery, and to the jury all questions of fact in cases at law for the recovery of money or of any specific real or personal property." However, Silver fails to cite the remainder of this sentence, which continues that "the constitutional declaration that 'the right of jury trial shall remain inviolate' ***does not apply to cases within the equitable jurisdiction of the Court.***" Id. (citing Lucken v. Wichman, 5 S.C. 411 (1874)) (emphasis added). Here, pursuant to S.C.Code Ann. § 29-3-660 and two centuries of practice, the subject mortgage foreclosure as well as the incidental determination of the deficiency judgment is within such jurisdiction, and properly before the Master-in-Equity.

referral[8] are baseless as Rules 53 and 71 of the South Carolina Rules of Civil Procedure authorize Clerks of Court to refer actions, like this, to a Master-in-Equity. Rule 53(b) states that "[i]n . . . an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge ***or the clerk of court.***" Rule 53(b), SCRCP (emphasis added). Rule 71(a) further provides that "[a]ctions to foreclose liens or obtain partition of real property ***shall be tried by the court,*** and ***shall ordinarily be referred to a master*** pursuant to Rule 53." Rule 71(a), SCRCP (emphasis added). The present lawsuit is a foreclosure action. Thus, pursuant to Rules 53 and 71, the Clerk of Court had the authority to refer this foreclosure action to the Master-in-Equity and properly did so. See 66 Am.Jur.2d References § 6 (citing Harrell v. Harrell, 117 S.E.2d 728 (N.C. 1961)) ("[i]t has been held that statutes that authorize trial by referees are to be liberally construed to facilitate the work of the court and to simplify the issues to be submitted to a jury if the right to trial by jury is preserved").

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[8] Silver also claims that the Order of Reference was obtained *ex parte*, but this argument is simply inaccurate and it is misleading. "A judicial proceeding, order, injunction, etc., is said to be *ex parte* when it is taken or granted at the instance and for the benefit of one party only, ***and without notice to, or contestation by, any person adversely interested.***" Black's Law Dictionary, West Publishing Co., p. 399 (1991). The two federal cases cited by Silver in its Brief, purportedly in support of its position, are both true examples of *ex parte* relief, involving the issuance of temporary restraining orders without notice to the opposing parties. See App. Brief at 4 (citing Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers, 415 U.S. 423, 428, 94 S. Ct. 1113, 1119 (1974); Martin's Herend Imports v. Diamond & Gem Trading USA, 112 F.3d 1296, 1299 (5th Cir. 1997)). In these cases, relief was granted by the court on the day each action was filed, prior to any appearances by the opposing parties or their counsel. Here, TD Bank filed its Motion for Reference to the Master-in-Equity months after the case was filed, after all parties to the action had made an appearance. Importantly, all parties were served with the Motion and had notice thereof, as required by the South Carolina Rules of Civil Procedure, prior to the Clerk of Court's entry of the Order.

Notwithstanding the Clerk of Court's authority to refer the case as a foreclosure action, Judge Simmons, in the February 10, 2012, Order Denying Silver's Motion to Vacate the Order of Reference, ***sitting both as Master-in-Equity and Special Circuit Court Judge***, held that, even had the case not been referred by the Clerk of Court, reference would have been otherwise appropriate "[i]n light of the posture of the pleadings of Silver." (R. p. 7.) Notably Rule 53(b) allows "***the circuit court*** . . . , upon application of any party or ***upon its own motion***, [to] direct a reference of some or all of the causes of action in a case." Rule 53(b), SCRCP (emphasis added). TD Bank's claim against Silver arises from a Guaranty Agreement, contingent upon the Borrower's default. In its Amended Answer, Silver admits to executing the Guaranty Agreement in favor of the Bank, (R. p. 11, ¶ 6); admits the terms of the Guaranty Agreement control with regard to when the obligations contained therein are triggered, id.; admits the terms of the Note control with regard to its maturity, (R. p. 12, ¶ 10; and admits Copper Lakes is in default, owing money to TD Bank under the terms of the Note, (R. pp. 12-13, ¶ 11. As the construction of a written contract is a matter for the court to decide, see Cafe Assocs., 305 S.C. at 9, 406 S.E.2d at 164, Judge Simmons was correct in finding that, regardless of the nature of TD Bank's claims against Silver, there are no issues involved between these parties "that would allow or necessitate a trial by jury." (R. p. 7.) Thus, even if the Clerk of Court had not referred the matter as a foreclosure action, reference nonetheless still was appropriate pursuant to Rule 53(b).

Accordingly, the case was property referred to the Master-in-Equity either by the Clerk of Court or by Judge Simmons, sitting as Special Circuit Court Judge pursuant to Rule 53(b).

II. ALTERNATIVELY, THE COURT SHOULD DISMISS THIS APPEAL AS THE ORDERS ARE NOT IMMEDIATELY APPEALABLE BECAUSE THEY DO NOT DENY SILVER A MODE OF TRIAL TO WHICH IT IS ENTITLED AS A MATTER OF RIGHT.

Alternatively, the Court should dismiss Silver's appeal, as the Orders are not immediately appealable because Silver is not entitled to a jury trial as a matter of right.[9] As the South Carolina Supreme Court has held, "[a]n order denying a party a jury trial is not immediately appealable ***unless it deprives him of a mode of trial to which he is entitled as a matter of right***." C&S Real Estate Servs., Inc. v. Massengale, 290 S.C. 299, 300, 350 S.E.2d 191, 192 (1986), modified on other grounds by Johnson v. S.C. Nat'l Bank, 292 S.C. 51, 354 S.E.2d 895 (1987), (emphasis added); see also Brown v. Greenwood Sch. Dist. 50 Bd. of Trs., 344 S.C. 522, 544 S.E.2d 642 (Ct.App.2001) (dismissing an appeal because the order in question did not deny the appellant a jury trial to which it was entitled as a matter of right). In C&S, a mortgage foreclosure case, the state Supreme Court dismissed an appeal of an order that denied the appellant a jury trial on her counterclaims because the order was not immediately appealable. The C&S court held that the order was not immediately appealable because it denied the appellant a jury trial in an equitable action and on counterclaims that were equitable and/or permissive in nature, and, therefore, did not entitle the appellant to a jury trial as a matter of right. Id., 290 S.C. at 300-301, 350 S.E.2d at 192-93 (finding that an equitable counterclaim and a permissive, legal counterclaim, which is asserted in an equitable action, do not entitle the party to a jury trial). Thus, because "[t]he order under appeal did not deprive [the]

[9] At the outset of this appeal, TD Bank filed a Motion to Dismiss the Appeal or, in the alternative, to Remand the Foreclosure Claim to the Lower Court for Adjudication. This was initially granted by the Court before the appeal was reinstated by Order dated September 8, 2012. In this Order, however, the Court invited the parties to raise the issue of appealability in their briefs.

appellant of a mode of trial to which she was entitled as a matter of right," the Supreme Court dismissed the appeal. Id. Similarly, in this instance, the Orders in question are not immediately appealable because they do not deny Silver a "mode of trial to which [it is] entitled as a matter of right." Id.

As discussed above, Silver does not have the right to a jury trial, as the Legislature has specifically declared that deficiencies in foreclosure cases – ***even those as to third parties "other than the mortgagor"*** – are to be tried by the court, not a jury. See S.C.Code Ann. § 29-3-660 (2011) (emphasis added); see also Davant, 292 S.C. at 178, 355 S.E.2d at 296; Perpetual Bldg., 270 S.C. at 341, 242 S.E.2d at 408; Rule 71(a), SCRCP ("Actions to foreclose liens or obtain partition of real property ***shall be tried by the court***, and shall ordinarily be referred to a master pursuant to Rule 53.").

Furthermore, as the lower court held in its Orders, ***even if the underlying action was not an equitable foreclosure action***, Silver still would not be entitled to a jury trial because it "has not pled any legal claims against TD Bank or any other party that would allow or necessitate a trial by jury." (R. p. 7; R. pp. 128-31.)

Thus, because Silver does not have the right to a jury trial, the Orders do not deny it "a mode of trial to which [it] is entitled as a matter of right." C&S, 290 S.C. at 300, 350 S.E.2d at 192. The Orders therefore are not immediately appealable, and the Court should dismiss Silver's appeal.[10]

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[10] Alternatively, the Court, pursuant to South Carolina Appellate Court Rule 205, should remand TD Bank's foreclosure claim against Copper Lakes to the Greenville County Master-in-Equity for hearing and, if warranted, a foreclosure sale because the outcome of Silver's appeal will not affect the foreclosure action. Rule 205 of the Appellate Court Rules provides:

> Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative

CONCLUSION

For the reasons stated herein, TD Bank respectfully submits that the decision of the lower court should be AFFIRMED. Alternatively, for the reasons stated herein, TD Bank respectfully submits that this appeal should be DISMISSED.

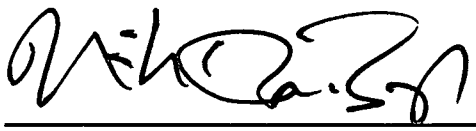
> tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. ***Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.***

Rule 205, SCACR (emphasis added). As noted above, TD Bank's lawsuit essentially is comprised of two parts:

1. A foreclosure claim against Copper Lakes; and
2. A deficiency claim against Grande Dunes and Silver.

Silver's appeal does not and cannot possibly affect TD Bank's foreclosure claim against Copper Lakes because Silver is not involved in the foreclosure, as it is not a party to the Note and Mortgage at issue. Furthermore, regardless of whether Silver is entitled to a jury trial on the deficiency claim, a ***court*** will try the equitable foreclosure of the Mortgage Copper Lakes executed in favor of TD Bank. See, e.g., Rule 71(a), SCRCP ("Actions to foreclose liens . . . ***shall*** be tried by the court") (emphasis added). As a result, Silver's appeal of the Orders denying it a jury trial as to the deficiency claim does not affect TD Bank's foreclosure claim against Copper Lakes. Therefore, pursuant to Rule 205, the Court should remand the foreclosure claim and permit the lower court to proceed with the foreclosure hearing and sale. Not only is such a remand warranted under Rule 205, but it will also avoid unnecessary delay of the adjudication of the foreclosure claim and continued clouding of the title of the Real Property in question.

March 18, 2013
Greenville, South Carolina



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity and Special Circuit Court Judge

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Case No. 10-CP-23-10047

TD Bank National Association, Successor by Merger to Carolina First Bank, — Respondent,

v.

Copper Lakes, LLC f/k/a Tall Pines Investments, LLC; Grande Dunes Development Company, LLC; and Silver Real Estate Fund I., L.P. — Defendants,

of whom

Silver Real Estate Fund I., L.P. is — Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent, TD Bank National Association, Successor by Merger to Carolina First Bank, complies with Rule 211(b), SCACR, and also complies with Supreme Court Order 2007-08-13-02 regarding Personal Data Identifiers and Other Sensitive Information.

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