

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III

Appellate Case No. 2013-000222

Bloody Point Property Owners Association, Inc., David L.
Fingerhut, and Patricia M. Santry Respondents,

v.

William A. Ashton, Jr. and Michele C. Ashton.....Appellants.

RECORD ON APPEAL

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SC Court of Appeals

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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Bloody Point Property Owners' Association, Inc.,)

David L. Fingerhut and Patricia M. Santry,)

Plaintiff,)

vs.)

William A. Ashton, Jr. and Michele C. Ashton,)

Defendants.)

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-07-2176

**ORDER DENYING DEFENDANTS'
MOTION TO VACATE/SET ASIDE
FORECLOSURE SALE, VOID
MASTER IN EQUITY DEED, AND
VACATE/SET ASIDE ORDER**

This matter comes before the Court on Defendants William A. Ashton, Jr. and Michele C. Ashton's Motion to Vacate/Set Aside Foreclosure Sale, Void Master in Equity Deed and Vacate/Set Aside Order ("Motion to Vacate"). In the Motion to Vacate, Defendants seek to vacate the foreclosure sale and order and void the Master in Equity Deed conveying an interior lot known as Lot 55, Daufuskie Island Club, Bloody Point, Beaufort County, South Carolina ("Property") to David L. Fingerhut and Patricia M. Santry ("Fingerhut Plaintiffs"). The Fingerhut Plaintiffs were the successful bidders at the foreclosure sale.

The Court held oral argument on May 14, 2012. Present for the Defendants was John W. Farrell of The Law Offices of James F. Berl, P.C. Present for Plaintiff Bloody Point Property Owners' Association, Inc. (the "Association") was Terry Finger of Finger & Fraser, P.A.. Present for the Fingerhut Plaintiffs was Matthew Tillman of Womble Carlyle Sandridge & Rice, L.P.

At the outset of the hearing, the Court heard the Fingerhut Plaintiffs' Motion to Intervene as plaintiffs in the action. The basis for the Fingerhut Plaintiffs' motion is that they were the successful bidders at the foreclosure sale and were the current owners of the Property. All parties consented to the motion and the Fingerhut Plaintiffs' motion was granted. Further, the parties represented that a companion case filed by the Defendants, captioned *William A. Ashton, Jr. and Michele C. Ashton v. David L. Fingerhut and Patricia M. Santry*, Case No. 2012-CP-07-532 ("Companion Lawsuit"), involved claims identical to those set forth in the present motion.

Upon consent of the parties, the Court dismissed the Companion Lawsuit. The Court will issue a separate order formally dismissing the Companion Lawsuit and cancelling the Lis Pendens filed in Case No. 2012LP0700182.

Findings of Fact

On May 17, 2011, the Association filed a Lis Pendens, Summons and Complaint in this action, by which it sought to foreclose on its lien for unpaid assessments and charges. The Lis Pendens, Summons and Complaint were delivered to the Chester County, Pennsylvania Sheriff's Office for service on the Defendants at their last known address of 120 Marlbrooke Way, Kennett Square Pennsylvania. According to the Affidavit of Service returned by the Chester County Sheriff's Office, a deputy attempted to serve the Defendants at this address on four separate occasions, without success.

Counsel for the Association filed a motion for service by publication. On July 20, 2011, Jerri Ann Roseneau, clerk of court for Beaufort County, South Carolina, issued and filed an Order for Publication authorizing service of the Defendants by publishing a copy of the Summons and Complaint in the *Island Packet* once a week for three consecutive weeks and mailing a copy of the Summons and Complaint to Defendants at their last known address.¹ The Summons and Complaint were published in the *Island Packet* and mailed to the Defendants in accordance with the Order for Publication.

By order filed on September 28, 2011, the Defendants were placed in default and this action was referred to this Court. On December 2, 2011, the Court held a hearing on the foreclosure of the Property. By order dated December 6, 2011, the Court entered a Master's Report and Judgment of Foreclosure and Sale, in which the Court specifically found that the parties and the subject matter were properly before the Court, service was made on the Defendants and the Defendants were in default. The Property was sold at a foreclosure sale on January 3, 2012. On January 6, 2012, the Court executed a Master in Equity Deed transferring the Property to the Fingerhut Plaintiffs in exchange for the high bid of \$8,800.00. The Master in Equity Deed was recorded on January 11, 2012.

¹ The *Island Packet* is a newspaper circulated in Beaufort County, South Carolina.

Conclusions of Law

In the Motion to Vacate, Defendants argue that the foreclosure sale and Master-in-Equity Deed should be set aside for three reasons: (1) The foreclosure sales price was so grossly inadequate so as to “shock the conscience” of the Court; (2) The Defendants were not properly served with the Summons and Complaint, and therefore the Court did not have personal jurisdiction over the Defendants; and (3) The Association failed to mail the Summons and Complaint to the Defendants at their last known address and therefore did not comply with the Order for Publication. The Plaintiffs opposed each of the arguments set forth by the Defendants and the Fingerhut Plaintiffs also argued that they were good faith purchasers for value under South Carolina Code Ann. § 15-39-870. The Court addresses each of these arguments in turn.

1. The sales price was not inadequate and does not “shock the conscience” of the Court.

Under South Carolina law, “[i]nadequacy of price, unless so gross as to shock the conscience of the court or accompanied by circumstances from which fraud may be clearly inferred, will not justify the overthrow of a judicial sale.” Bennett v. Price, 237 S.C. 64, 73, 115 S.E.2d 659, 664 (1960). There is no bright line rule for determining what percentage of the sale value must be with respect to the actual value in order to satisfy the “shock the conscience” standard. Eastern Savings Bank, FSB v. Sanders, 373 S.C. 349, 359, 644 S.E.2d 802, 807 (Ct. App. 2007). “However, a search of South Carolina jurisprudence reveals only when judicial sales are for less than ten percent of a property's actual value, have our courts consistently held the discrepancy to shock conscience of the court.” Id.

Defendants argue that the 2012 auction purchase price was grossly inadequate in comparison to the 2001 purchase price for the Property of \$201,500. In addition, the Defendants submitted an appraisal prepared by Berendina E. Page that sets the Property value at \$140,000. This appraisal states that its intended use is to rebut the foreclosure sales price. Further, the appraisal uses non-comparable sales data from oceanfront lots and only cites Multiple Listing Service listing data for interior lots as support for the valuation conclusion.

The Fingerhut Plaintiffs argued that in addition to the \$8,800 purchase price, they paid an additional \$2,793.20 for assessments and property taxes due and that amount should be considered when calculating the price paid at foreclosure. The Court holds that these amounts

are additional amounts paid by the purchaser to obtain the Property free and clear of all liens and are properly included in the purchase price.

The Fingerhut Plaintiffs also produced a Bidder Redemption Notification showing that the Property was sold for \$10,000 in the 2010 Beaufort County Delinquent Tax Auction. The Property was subsequently redeemed by Defendants. The Fingerhut Plaintiffs also produced an appraisal compiled by Michael J. Whitton that established a value as of January 19, 2012 in the amount of \$17,000. To support his conclusion, Mr. Whitton used comparable sales data, not listing data, from interior lots. This appraisal was further supported by an affidavit submitted by David Fingerhut that affirms the appraisal was ordered for the purpose of obtaining title insurance and not to support the value for purposes of this action.

The Court finds that the Property would have to be worth more than \$115,932.00 for the sales price to be less than 10% of the actual value. The appraisal provided by the Fingerhut Plaintiffs and 2010 tax sale data are more reliable than the valuation information produced by the Defendants. Therefore, the Court finds that the actual value of the Property is consistent with the Fingerhut Plaintiff's appraisal and the actual sales price at the 2010 Beaufort County Delinquent Tax Sale and, accordingly, is far less than the \$115,932.00 required to "shock the conscience" of the Court. The Defendants' motion is denied on this ground.

2. The Defendants were properly served with the Summons and Complaint, and therefore the Court had personal jurisdiction over the Defendants.

The Defendants argue that they were not properly served pursuant to the applicable publication statute, S.C. Code Ann. § 15-9-740. Section 15-9-740 provides, in part:

The order of publication shall direct the publication to be made in one newspaper, to be designated by the officer before whom the application is made, most likely to give notice to the person to be served and for such length of time as may be deemed reasonable not less than once a week for three weeks. The court, judge, clerk, master or judge of probate shall also direct that a copy of the summons be forthwith deposited in the post office directed to the person to be served at his place of residence, unless it appears that such residence is neither known to the party making the application nor can, with reasonable diligence, be ascertained by him. In case of minors, persons imprisoned outside of this State, lunatics confined outside of this State or in like cases, a similar order shall be made and like proceedings be had as in case of adults not under disabilities.

The Defendants assert that, by publishing the Summons and Complaint in the *Island Packet* and not in a newspaper of general circulation in Chester County, Pennsylvania, the Association failed to effectuate proper service. This argument is without merit. As set forth in the affidavit returned by the Chester County, Pennsylvania Sheriff's Office, a deputy attempted to serve both Defendants on four separate occasions at the address they claim as their residence. The Association took appropriate action by publishing the Summons and Complaint in the *Island Packet*, a newspaper of general circulation in the county in which the Property is located. Thus, the *Island Packet* was the newspaper most likely to give notice to the Defendants. For this reason, service was proper and the Court had jurisdiction over the Defendants.

3. The Association complied with the Order for Publication.

Defendants assert that the Association never mailed a copy of the Summons and Complaint to their last known address as required in the Order for Publication. This argument is supported by an affidavit of each Defendant, in which each Defendant has claimed to reside at 120 Marlbrooke Way, Kennett Square, Pennsylvania since 1989. The Fingerhut Plaintiffs submitted a copy of a July 21, 2011 letter from attorneys for the Association to the Defendants, addressed to the 120 Marlbrooke Way address, in which the Summons and Complaint were enclosed. This letter is further supported by the uncontroverted Affidavit of Julie Serafino, attorney for the Association, in which she affirms that the Summons and Complaint were mailed to the 120 Markbrooke Way address.

The Court finds that the Summons and Complaint were mailed to the address that Defendants claim to be their residence since 1989. Therefore, the Association complied with the Order for Publication and the Defendants' motion is denied as to this ground.

4. The Fingerhut Plaintiffs are good faith purchasers for value under S.C. Code Ann. § 15-9-740.

The Fingerhut Plaintiffs argue that they are good faith purchasers for value under South Carolina Code Ann. § 15-39-870, and therefore the foreclosure sale must be upheld. Code Section 15-39-870 provides:

Upon the execution and delivery by the proper officer of the court of a deed for any property sold at a judicial sale under a decree of a court of competent jurisdiction that proceedings under which such sale is made shall be deemed res judicata as to any and all bona fide purchasers for value without notice, notwithstanding such sale may not subsequently be confirmed by the court. Judicial sales shall be res judicata as to innocent purchasers, even without confirmation.

The rationale for the statute is the well established public policy of protecting good faith purchasers and upholding the finality of a judicial sale. Robinson v. Estate of Harris, 378 S.C. 140, 144, 662 S.E.2d 420, 422 (Ct. App. 2008).

In Robinson, the defaulting owners of the subject property sought to vacate the foreclosure sale due to ineffective service. Id. The Court noted that the bona fide purchaser submitted documents from the court file demonstrating that (1) service was made upon defendants; (2) both defendants were in default; (3) the attorneys of record were notified of the hearing; and (4) neither defendants were in the United States military service. Id. at 145, 662 S.E.2d at 423. The purchaser also produced the master's deed. Id. The Court further noted that the purchaser had satisfied all of the elements to be considered a bona fide purchaser for value: (1) actual payment of the purchase price of the property, (2) acquisition of legal title to the property, or the best right to it, and (3) a bona fide purchase, "i.e., in good faith and with integrity of dealing, without notice of a lien or defect." Id.

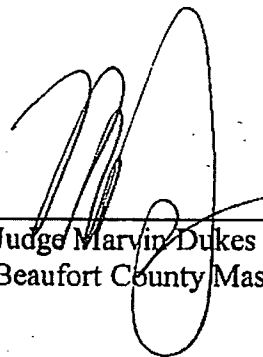
At the time of the foreclosure sale, the court file reflected that the Defendants had been served, were in default, had received notice, and were not in military service. Further, the Fingerhut Plaintiffs made actual payment of the purchase price at the foreclosure sale and acquired title through the Master in Equity Deed. Finally, they had no notice of any impropriety or irregularity in the foreclosure process and therefore took title in good faith and with integrity of dealing, without notice of a lien or defect. Therefore, pursuant to South Carolina Code Ann. § 15-39-870 the Fingerhut Plaintiffs are good faith purchasers for value, the foreclosure sale must be upheld and the Defendants' Motion to Vacate is denied.

Order

For the reasons set forth above, Defendants William A. Ashton, Jr. and Michele C. Ashton's Motion to Vacate/Set Aside Foreclosure Sale, Void Master in Equity Deed and

Vacate/Set Aside Order is **denied**.

7/24, 2012
Beaufort, South Carolina



Judge Marvin Dukes
Beaufort County Master in Equity

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-07-02176

BLOODY POINT PROPERTY OWNERS' ASSOCIATION, INC.

WILLIAM A. ASHTON, JR. AND MICHELE C. ASHTON

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

AFTER DUE CONSIDERATION I HEREBY DENY DEFENDANT'S MOTION TO RECONSIDER MY ORDER DENYING DEFENDANTS' MOTION TO SET ASIDE FORECLOSURE SALE, VOID MASTER IN EQUITY DEED AND VACATE/SET ASIDE ORDER, FILED JULY 25, 2012.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

3069

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the 28th day of Dec, 2012 and a copy mailed first class or placed in the appropriate attorney's box on this 7th day of Jan, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

TERRY A. FINGER

JULIE A SERAFINO

ATTORNEY(S) FOR THE PLAINTIFF(S)

JAMES F. BERL

DANIEL Q. ORVIN

MATTHEW TILLMAN

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: N/A

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-07-02176

BLOODY POINT PROPERTY OWNERS' ASSOCIATION, INC.

WILLIAM A. ASHTON, JR. AND MICHELE C. ASHTON

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☒ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

AFTER DUE CONSIDERATION, I HEREBY DENY DEFENDANT'S MOTION TO RECONSIDER MY ORDER DENYING DEFENDANTS' MOTION TO SET ASIDE FORECLOSURE SALE. VOID MASTER IN EQUITY DEED AND VACATE/SET ASIDE ORDER. FILED JULY 25, 2012.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
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		\$
		\$

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Circuit Court Judge

3069

Judge Code

Date

12/27/12

For Clerk of Court Office Use Only

17-276

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

TERRY A. FINGER

JULIE A SERAFINO

ATTORNEY(S) FOR THE PLAINTIFF(S)

JAMES F. BERL

DANIEL Q. ORVIN

MATTHEW TILLMAN

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: N/A

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

FORM 4

Amended (ending case)
JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-07-02176

BLOODY POINT PROPERTY OWNERS' ASSOCIATION, INC.

WILLIAM A. ASHTON, JR. AND MICHELE C. ASHTON

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

AFTER DUE CONSIDERATION I HEREBY DENY DEFENDANT'S MOTION TO RECONSIDER MY ORDER DENYING DEFENDANTS' MOTION TO SET ASIDE FORECLOSURE SALE, VOID MASTER IN EQUITY DEED AND VACATE/SET ASIDE ORDER, FILED JULY 25, 2012.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

This amended form 4 is to correct the "ends" portion of the previous form 4 filed with the final order in this case.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

3069

Judge Code

Date

1/23/13

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

TERRY A. FINGER

JULIE A SERAFINO

ATTORNEY(S) FOR THE PLAINTIFF(S)

JAMES F. BERL

DANIEL Q. ORVIN

MATTHEW TILLMAN

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: N/A

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

Bloody Point Property Owners'
Association, Inc.,)

Plaintiff,)

vs.)

William A. Ashton, Jr. and Michele
C. Ashton,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-07-1176: 25

CLERK OF COURT
BEAUFORT COUNTY, S.C.

NOTICE OF MOTION AND
MOTION TO VACATE/SET ASIDE
FORECLOSURE SALE, VOID
MASTER IN EQUITY DEED, AND
VACATE/SET ASIDE ORDER

TO: THE PLAINTIFF AND ITS ATTORNEY, JULIE A. SERAFINO, ESQUIRE, AND DAVID
L. FINGERHUT AND PATRICIA M. SANTRY, FORECLOSURE BIDDERS

YOU WILL PLEASE TAKE NOTICE that the Defendants, William A. Ashton, Jr. and Michele C. Ashton ("Ashton"), by and through their undersigned counsel, will move before the presiding judge of the Court of Common Pleas for the Fourteenth Judicial Circuit, Beaufort County, South Carolina, on the tenth day after service hereof, or as soon thereafter as counsel may be heard, for: (1) an Order setting aside the foreclosure sale of January 3, 2012; (2) an Order voiding that certain Master in Equity Deed dated January 6, 2012, which was recorded on January 11, 2012 in the Office of the Register of Deeds for Beaufort County, South Carolina, in Book 3111 at Page 1291; (3) an Order setting aside the Honorable Judge Marvin Dukes's Order dated December 2, 2011; and (4) an Order to stay the sale of the subject property in the above-captioned action pending resolution of these motions.

This motion is based upon Rule 4, Rule 55(c), and Rule 60(b), South Carolina Rules of Civil Procedure, case law, and such other evidence as may be produced at the hearing thereof. As grounds therefore, these Defendants would respectfully show the Court the following:

I. Sales price “shocks the conscience”

“[T]he determination of whether a judicial sale should be set aside is a matter left to the sound discretion of the trial court.” Eastern Savings Bank, FSB v. Sanders, 373 S.C. 349, 354, 644 S.E.2d 802, 805 (Ct. App. 2007)(citing Investors Sav. Bank v. Phelps, 303 S.C. 15, 397 S.E.2d 780. “A judicial sale will be set aside when either: (1) the sale price ‘is so gross as to shock the conscience[;]’ or (2) the sale ‘is accompanied by other circumstances warranting the interference of the court.’” Wells Fargo Bank, N.A. v. Turner, 378 S.C. 147, 150, 662 S.E.2d 424, 425 (Ct. App. 2008) (citing, Poole v. Jefferson Standard Life Ins. Co., 174 S.C. 150, 177 S.E. 24 (1934). “Since the opinion in *Poole*, our courts have continued to set aside judicial sales based on ‘grossly inadequate’ sales prices.” *Id.* [referring to Investors Sav. Bank v. Phelps, 303 S.C. 15, 397 S.E.2d 780 (Ct. App. 1990)(stating that sales prices amounting to 4.2%, 4.4%, and less than 10% of the property value all fall within the percentage range of a grossly inadequate sales price).

In our case, Ashton paid \$201,500.00 for the subject property. At the foreclosure sale on January 3, 2012, and as set forth more specifically in the Master In Equity Deed, the successful foreclosure bidders, David L. Fingerhut and Patricia M. Santry, paid \$8,800.00 for the property. The sales price in our case was 4.37% of the amount paid by Ashton. The sales price that Fingerhut and Santry paid for the subject property “is so gross as to shock the conscience.” (emphasis added), and squarely fits into the percentage range set forth in Investors Sav. Bank.

It is reasonable to assume that no one would allow a piece of property in which they paid close to a quarter of a million dollars go to auction for \$8,800.00. As such, the foreclosure sale and Master In Equity Deed should be set aside/vacated and/or voided.

II. Order dated December 2, 2011

In order to commence an action, Rule 4 of the South Carolina Rules of Civil Procedure requires copies of the Summons and Complaint to be served on each Defendant. "Rule 4, SCRCp, serves at least two purposes. It confers personal jurisdiction on the court and assures the Defendant of reasonable notice of the action." *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995). "A judgment is void . . . if a court acts without [personal] jurisdiction." *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995).

In our case, the Defendants were never personally served with the Summons or Complaint. The Plaintiff produced an affidavit of service from Corporal Kurt Hansen ("Hansen") of the Chester County Pennsylvania Sheriff's Office ("Sheriff"), which states that Hansen made four attempts to serve Ashton, but was unsuccessful. However, those four attempts at serving Ashton only occurred during a two (2) week period, and three of those attempts were made during business hours, while both Defendants were at work. Had Hansen left his card at the Ashton residence, Ashton would have contacted him to make arrangements for service. Further, the Plaintiff could have easily hired a private process server who would have attempted service before or after normal business hours.

Although it is anticipated that the Plaintiff will argue that Ashton was served by publication, S.C. Code of Laws § 15-9-740 specifically states that publication shall "be made in one newspaper, . . . , most likely to give notice to the person to be served" (Emphasis added). The Plaintiff, knowing that Ashton resided in Chester County, Pennsylvania (see, i.e. the various "certificates of mailing" filed by the Plaintiff and located in the Court's file), published the Notice of Filing Complaint and Summons in the Island Packet, a newspaper located in Beaufort County, South Carolina. It is reasonable to expect that a newspaper of general circulation in Beaufort County,

South Carolina, would not be a newspaper "most likely to give notice" to Ashton, as they reside in Chester County, Pennsylvania. Because Ashton was not served with the Summons and Complaint and had no notice of the action, Judge Dukes's December 2, 2011 Order is void due to a lack of personal jurisdiction over Ashton.

Rule 55(c) states "[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Rule 60(b)(4) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding [because] . . . the judgment is void." Because the judgment is void, the Order of Default should be set aside.

III. Stay the Sale of Real Property

Any sale of Ashton's property should be stayed until such time as the above motions are heard, and until proper service of the Summons and Complaint can be affected upon Ashton so that they can be given an opportunity to answer and defend the Complaint in this action.

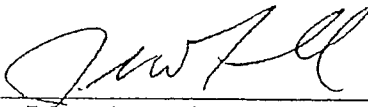
IV. Conclusion

For the reasons stated above, Ashton requests: (1) that the foreclosure sale of January 3, 2012 be vacated/set aside; (2) that the Master in Equity Deed dated January 6, 2012, which was recorded on January 11, 2012 in the Office of the Register of Deeds for Beaufort County, South Carolina, in Book 3111 at Page 1291, be voided; (3) that the Honorable Judge Dukes's Order of December 2, 2011 be set aside and/or vacated; (4) and that any sale of the subject property be stayed until the above matters are resolved.

Pursuant to Rule 11, South Carolina Rules of Civil Procedure, counsel for the Defendants, William A. Ashton, Jr. and Michele C. Ashton, hereby certifies that consultation with opposing counsel would serve no useful purpose.

Respectfully Submitted:

LAW OFFICES OF JAMES F. BERL, P.C.

By: 

John W. Farrell

James F. Berl

Attorneys for Defendants, William A.
Ashton, Jr. and Michele C. Ashton

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Hilton Head Island, SC
This 1st day of February, 2012.

780 (Ct. App. 1990)(stating that sales prices amounting to 4.2%, 4.4%, and less than 10% of the property value all fall within the percentage range of a grossly inadequate sales price).

In our case, Defendants paid \$201,500.00 for the subject property. At the foreclosure sale on January 3, 2012, and as set forth more specifically in the Master In Equity Deed, the successful foreclosure bidders, David L. Fingerhut and Patricia M. Santry, paid \$8,800.00 for the property. The sales price in our case was 4.37% of the amount paid by Defendants. The sales price that Fingerhut and Santry paid for the subject property **“is so gross as to shock the conscience”** (emphasis added), and squarely fits into the percentage range set forth in Investors Sav. Bank.

It is reasonable to assume that no one would allow a piece of property in which they paid close to a quarter of a million dollars go to auction for \$8,800.00. As such, because the sales price was **“so gross as to shock the conscience,”** and because the sale was **“accompanied by other circumstances warranting the interference of the court,”** as set forth more specifically below, the foreclosure sale of January 3, 2012 should be vacated/set aside, and the Master in Equity Deed dated January 6, 2012, which was recorded on January 11, 2012 in the Office of the Register of Deeds for Beaufort County, South Carolina, in Book 3111 at Page 1291 should be voided.

Violation of Due Process

“The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.” Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 561, 505 S.E.2d 598, 603 (Ct. App. 1998). Due process demands “notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights. A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on.

Webster v. Clanton, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972).

In order to commence an action, Rule 4 of the South Carolina Rules of Civil Procedure requires copies of the Summons and Complaint to be served on each Defendant. “Rule 4, SCRCp, serves at least two purposes. It confers personal jurisdiction on the court and assures the Defendant of reasonable notice of the action.” Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995). “A judgment is void . . . if a court acts without [personal] jurisdiction.” Thomas & Howard Co. v. T.W. Graham & Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995).

Rule 55(c) states “[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).” Rule 60(b)(4) provides that “[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding [because] . . . the judgment is void.”

The Defendants were not personally served with
the Summons and Complaint, so the
Court acted without jurisdiction

In our case, the Defendants were never personally served with the Summons or Complaint. The Plaintiff produced an affidavit of service from Corporal Kurt Hansen (“Hansen”) of the Chester County Pennsylvania Sheriff’s Office (“Sheriff”), which states that Hansen made four attempts to serve the Defendants, but was unsuccessful. However, those four attempts at serving the Defendants only occurred during a two (2) week period, and three of those attempts were made during morning

business hours, while both Defendants were at work. Had Hansen left his card at the Defendants' residence, the Defendants would have contacted him to make arrangements for service. Further, the Plaintiff could have easily hired a private process server who would have attempted service before or after normal business hours.

The Plaintiff's attempt to serve the
Defendants by publication did not comply with
South Carolina Code of Laws § 15-9-710, et seq.
so the Court acted without jurisdiction

Although it is anticipated that the Plaintiff will argue that Defendants were served by publication, South Carolina Code of Laws § 15-9-710, *et seq.*, sets forth very specific guidelines when service by publication upon an out-of-state defendant is made. An out-of-state defendant may be served by publication "when the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State and (a) that fact appears by affidavit to the satisfaction of the court or judge thereof" S.C. Code of Laws § 15-9-710. However, "the order of publication shall direct the publication to be made in one newspaper . . . **most likely to give notice to the person to be served . . . [and] the court . . . shall also direct that a copy of the summons be forthwith deposited in the post office directed to the person to be served at his place of residence. . . .**" S.C. Code of Laws § 15-9-740 (emphasis added).

In Brown v. Malloy, 345 S.C. 113, 546 S.E.2d 195 (Ct. App. 2001), the Plaintiff was unable to locate the Defendant, so the Family Court directed that service be effectuated through publication of the proceedings in a newspaper of general circulation in Los Angeles County, California. Brown, 546 S.E.2d at 197. However, the Defendant resided in Orange County, California, and the newspaper in which the notice was published was allegedly not circulated in Orange County. After failing to attend the hearing, the Family Court terminated the Defendant's

parental rights. Id. Subsequently, the Defendant filed a motion to set aside the adoption, on the premise that he had not been properly served. Id. Because the Family Court refused to determine whether the publication was adequate to provide notice of the proceedings, the Defendant argued that he was entitled to a hearing to determine whether or not the publication was sufficient to provide notice of the proceedings. The Court of Appeals remanded the case to the Family Court to determine whether or not “the notice as published was inadequate because it failed to meet the requirements of due process.” Brown, 546 S.E.2d at 202.

The Court of Appeals was unable to decide whether or not the issuance of the order of publication was proper, but the Court did hold that the Family Court erred in failing to determine whether service by publication gave the Defendant adequate notice of the proceedings. Brown, 546 S.E.2d at 199.

The Court of Appeals further discussed whether or not the Plaintiff complied with S.C. Code of Laws § 15-9-740. “The Order of Publication required that notice be published in a newspaper of general circulation in ‘the county where . . . the biological father is last known to reside.’” Brown, 546 S.E.2d at 201, 202. In its opinion, the Court of Appeals stated that “the order erroneously designated Los Angeles as the proper county . . . [because the Defendant alleged] the publication should have been in a newspaper of general circulation in Orange County, where he actually resided” Id. The Court of Appeals stated that “[s]uperimposed upon the requirements of the Order of Publication is the mandate of section 15-9-740, which requires publication in a newspaper ‘most likely to give notice to the person to be served.’” Id. (emphasis added).

The Plaintiff, knowing that the Defendants resided in Chester County, Pennsylvania, published the Notice of the Summons and Notice of Filing Complaint in *The Island Packet*, a newspaper located in Beaufort County, South Carolina. In our case, the Plaintiff's attempt to provide the Defendants notice via publication in *The Island Packet* was far more inadequate to give the Defendants notice of the foreclosure than the Plaintiff's attempt in Brown. In Brown, Los Angeles County and Orange County are in close proximity to each other, and the issue arose as to whether the newspaper was also circulated in Orange County. However, in our case, Beaufort County, South Carolina, and Chester County, Pennsylvania, are more than 600 miles from each other. There is no dispute that *The Island Packet* is not circulated in Chester County, Pennsylvania. Although the Plaintiff was, or should have been, well aware that the Defendants resided in Chester County, Pennsylvania (see, i.e. the various "certificates of mailing" filed by the Plaintiff in the Court's file and the notice address on the Beaufort County Treasurer's website), it is reasonable to expect that a newspaper of general circulation in Beaufort County, South Carolina, would not be a newspaper "most likely to give notice" to the Defendants. As such, the Plaintiff failed to comply with S.C. Code of Laws § 15-9-710, *et seq.*

It appears that in publishing the Summons and Notice of Filing Complaint in *The Island Packet*, the Plaintiff erroneously relied on S.C. Code of Laws § 15-9-720(B)(1), which states that "a court shall grant an order allowing a party with an interest in or a lien on a parcel of real property subject to . . . [an] action affecting the property's title to serve by publication. . . (2) in the county where the property is situated." However, that section applies to "unknown parties," and does not apply to parties who are known to the Plaintiff. Because the Plaintiff knew who these Defendants were, and knew where they resided, publication in Beaufort County, South

Carolina was not proper.

Although an unpublished opinion, Trico Engineering Consultants v. Kozlowski, 2010-UP-5111 (SCCA) provides insight on the procedures necessary to effectuate service under S.C. Code of Laws § 15-9-710, *et seq.* In Trico, the Plaintiff, after several unsuccessful attempts to serve the Defendant, sought an order for service by publication. The order of publication specifically required that a copy of the pleadings be mailed to the Defendant at his last known address. Although the Defendant's current address was unknown, the Plaintiff did have a "last known address" for the Defendant. Despite having the Defendant's last known address, the Plaintiff mailed the pleadings to a post office box, which was not mentioned in the order, nor was the post office box disclosed to the Plaintiff as an appropriate address for the Defendant. Because he never received notice of the Summons and Complaint, and failed to appear in the case, an order of default was entered against the Defendant. The Defendant asserted that the Plaintiff's failure to comply with S.C. Code of Laws § 15-9-740 rendered the service by publication invalid. However, the Circuit Court upheld the default judgment, and refused to grant relief to the Defendant under Rule 60(b)(1) and (4), SCRCP.

The Court of Appeals reversed the Circuit Court's decision and found that "service was not proper when Trico failed to comply with the specific mailing requirement of the circuit court's order." Trico, 2010-UP-5111 (SCCA). In reaching its decision, the Court of Appeals cited numerous authority in support of same. [see, i.e., Tenney v. Am. Pipe Mfg. Co., 96 F. 919 (D.S.C. 1899) (service by publication is in derogation of the common law, and **the statute must be strictly construed**) (emphasis added); Brown v. Malloy, 345 S.C. 113, 126-127, 546 S.E.2d 195, 201-201 (Ct. App. 2001) (**finding notice would be insufficient for due process purposes**).

when order of publication erroneously designated county where defendant did not reside as the proper county for publication and when notice was published in a newspaper of general circulation in improper county) (emphasis added); McGlooin v. Gwynn, 100 P.3d 621, 625 (Idaho 2004) (finding failure to comply with mailing requirement of rules of civil procedure in effecting service by publication required default judgment be set aside as service was invalid) (emphasis added); In re Marriage of Wilson, 502 N.E.2d 447, 449 (Ill. App. 1986) (holding failure to mail a copy of the publication to respondent's last known address as stated in the affidavit and required by relevant statute rendered service by publication invalid when strict compliance with the statute mandated mailing of the notice as a relevant part of the publication process); Sink v. Easter, 202 S.E.2d 138, 141 (N.C. App. 1974) (finding Plaintiff's failure to mail defendant copy of the notice of divorce when the service was by publication, as required by the statute, rendered service of process by publication invalid); Sanders v. Sanders, 278 A.2d 615, 618, (Md. App. 1971) (stating in divorce proceeding "where a statute requires not only a publication but also that a copy of the petition be mailed by registered mail to the defendant at his or her last known address, the mailing is as much a part of the service as the publication, and where there is a publication but there is no mailing, or the plaintiff causes a notice to be mailed to a false address, the service is void. The mere fact that the defendant has actual notice of the institution of the proceedings against him is not sufficient to give the court jurisdiction where the plaintiff has not complied substantially with the statutes on constructive service.") (quoting 24 Am.Jur.2d, Divorce and Separation § 286); Anderson v. Anderson, 82 N.E. 311, (Ill. 1907) (finding failure to mail notice of publication to the last known residence when notice mailed to 5857 State Street, Chicago, IL, rather than 5559 State Street, as stated in

the affidavit, was insufficient to confer jurisdiction)].

The Order for Publication, which was filed on July 11, 2011, specifically states “that a copy of the Summons and Complaint be forwarded to said Defendants by depositing the same in the United States mail, postage prepaid, addressed to the last known address of said Defendants.” A review of the Court’s file quickly indicates that the Plaintiff did not mail a copy of the Summons and Complaint to the Defendants.

Because the Defendants were not personally served with the Summons and Complaint, and because the Plaintiff failed to comply with S.C. Code of Laws § 15-9-710, *et seq.*, the Honorable Judge Dukes’s Order of December 2, 2011 is void due to a lack of personal jurisdiction over the Defendants, and therefore, must be set aside.

Conclusion

Based on the above, the Defendants would assert: (1) that the foreclosure sale of January 3, 2012 be vacated/set aside; (2) that the Master in Equity Deed dated January 6, 2012, which was recorded on January 11, 2012 in the Office of the Register of Deeds for Beaufort County, South Carolina, in Book 3111 at Page 1291, be voided; and (3) that the Honorable Judge Dukes’s Order of December 2, 2011 be set aside and/or vacated.

Respectfully submitted,

LAW OFFICES OF JAMES F. BERL, P.C.

By: _____

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Hilton Head Island, SC
February 29, 2012

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-07-2176

BEFORE THE HONORABLE
JUDGE OF THE COURT

) **SUPPLEMENTAL EXHIBIT TO**
) **BRIEF IN SUPPORT OF DEFENDANTS'**
) **MOTION TO VACATE/SET ASIDE**
) **FORECLOSURE SALE, VOID**
) **MASTER IN EQUITY DEED, AND**
) **VACATE/SET ASIDE ORDER**

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS	
	)	FOURTEENTH JUDICIAL CIRCUIT	
COUNTY OF BEAUFORT	)	CASE NO.: 2011-CP-07-2176	
Bloody Point Property Owners' Association, Inc.,	)		
	)		
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO	
	)	DEFENDANTS' MOTION TO	
vs.	)	VACATE/SET ASIDE	
	)	FORECLOSURE SALE, VOID	
William A. Ashton, Jr. and Michele C. Ashton,	)	MASTER IN EQUITY DEED, AND	
	)	VACATE/SET ASIDE ORDER	
Defendants.	)		

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David L. Fingerhut and Patricia M. Santry ("Foreclosure Purchasers"), hereby file their memorandum in opposition to Defendants' Motion to Vacate/Set Aside Foreclosure Sale, Void Master in Equity Deed, and Vacate/Set Aside Order.

FACTUAL BACKGROUND

This matter concerns Lot #55, Daufuskie Island Club Phase I, Bloody Point, as further described in Exhibit A to this memorandum. On January 13, 2010, the Plaintiff filed a Notice and Certificate of Lien on the Property, by which it asserted a lien for unclaimed assessments. The Notice and Certificate of Lien was filed in the Beaufort County Register of Deeds Office at Book 65, Page 392. The Plaintiff also properly filed a Lis Pendens, Summons and Complaint.

The Plaintiff hired the Chester County, Pennsylvania Sheriff's Office, which unsuccessfully attempted to personally serve the Defendants on several occasions between May 1, 2011 and June 14, 2011. See Exhibit B, Affidavit of Service and Sheriff's Costs. On July 18, 2011, Jerri Ann Rosenthau, the Clerk of Court for Beaufort County, South Carolina, issued an Order for Publication, by which the Plaintiff was authorized to serve the Defendants by publication in the *Island Packet*. See Exhibit C, Order for Publication. In compliance with the Order for Publication, attorneys for the Plaintiff mailed the relevant documents, including the Summons and Complaint and Order for Publication, to the Defendants at their last known address. See Exhibit D, Letter dated July 21, 2011. The Plaintiff published the Summons and

Complaint in accordance with the Order of Publication. See Exhibit E, Affidavit of Publication. The Defendants did not answer the Complaint, and were placed in default. See Exhibit F, Motion and Order of Default and Reference.

On December 2, 2011, the Honorable Marvin Dukes conducted a foreclosure hearing. After the conclusion of the hearing, the Court entered a Master's Report and Judgment of Foreclosure and Sale. See Exhibit G, Master's Report and Judgment of Foreclosure and Sale. The foreclosure sale was properly advertised and conducted, and on January 3, 2012, the property was sold to the Foreclosure Bidders for \$8,800.00. See Exhibit H, Master's Report of Sale, filed February 2, 2012. Judge Dukes issued a Master-in-Equity Deed to the Foreclosure Purchasers on January 6, 2012. See Exhibit I, Master's Deed.

ARGUMENT

The Defendants incorrectly seek to vacate the foreclosure sale and void the Master-in-Equity Deed on three alleged grounds:

1. The sales price at the foreclosure sale is so grossly small as to "shock the conscience" of the Court;
2. The Defendants were not properly served and therefore the Court did not obtain personal jurisdiction over the Defendants; and
3. The Plaintiff did not comply with the Order for Publication.

The Court must reject each of the arguments propounded by the Defendants, for the reasons set forth below.

I. The foreclosure sales price does not "shock the conscience."

"Inadequacy of price, unless so gross as to shock the conscience of the court or accompanied by circumstances from which fraud may be clearly inferred, will not justify the overthrow of a judicial sale." Bennett v. Price, 237 S.C. 64, 73, 115 S.E.2d 659, 664 (1960) (All cases cited are attached as Exhibit J). There is no bright line rule for determining what percentage of the sale value must be with respect to the actual value in order to satisfy the "shock the conscience" standard. Eastern Savings Bank, FSB v. Sanders, 373 S.C. 349, 359, 644 S.E.2d 802, __ (Ct. App. 2007). "However, a search of South Carolina jurisprudence reveals only when judicial sales

are for less than ten percent of a property's actual value, have our courts consistently held the discrepancy to shock conscience of the court.” Id.

a. The amount paid by the Foreclosure Purchasers includes taxes and assessments.

When determining the amount paid for the property at the foreclosure sale, the court is not restricted to the successful bid price, but should also look to any other amounts paid by the purchaser to obtain the property. See In re Barr, 170 B.R. 772 (Bankr. D.N.Y. 1994)(interpreting South Carolina law). Indeed, the Court should take into account assumption of any notes, taxes and assessments when determining the purchase price paid. Id. at 776. In the present case, the Foreclosure Purchasers paid \$8,800.00 plus \$2,793.20 for assessments due and property taxes. See Exhibit K, Closing Statement. Therefore, the Foreclosure Purchasers paid a total of \$11,593.20 for the Property.

b. The actual value of the Property may be ascertained from a variety of data, including any recent tax sales and appraisals.

When determining the value of the property, the Court is not restricted to the amount paid by the former owners or amounts owed on an outstanding note. Rather, the Court must look at other measures of value, including recent tax sales, appraisals, and testimony of persons involved in the bidding process. In Bennett, the Supreme Court of South Carolina held that the foreclosure price did not shock the conscience, specifically noting that the property “brought substantially the same price as when sold for taxes [three years prior].” Bennett, 237 S.C. at 73, 115 S.E.2d at 664. The South Carolina courts have also looked indicators of value, including tax appraisals and the testimony of value from the high bidder at the foreclosure sale. See Eastern Savings Bank, 373 S.C. at 353, 644 S.E.2d at 804 (tax appraisals); Wells Fargo Bank, N.A. v. Turner, 378 S.C. 147, 662 S.E.2d 424 (Ct. App. 2008) (testimony of bidder).

c. The Foreclosure Bidders paid nearly full value for the Property.

The Defendants have provided only one source of evidence concerning the actual value of the Property: their own affidavits stating that they purchased the Property on June 12, 2001 for \$201,500. While this assertion is accurate, it is not contemporary evidence of the actual value of

the Property. Rather, it is simply the price the Defendants paid for the Property over one decade ago, before the severe decline in real estate prices that occurred since 2007.

There are three much more recent indicators of the value of the Property. The first is the amount paid for the Property at a delinquent tax sale in October 4, 2010. On that date, Stono Title, LLC became the high bidder on the Property for the amount of \$10,000.¹ See Exhibit L, Bidder Redemption Notification. The second is the amount paid by the Foreclosure Purchasers at the foreclosure sale itself. Indeed, the sale was duly advertised for sale, the sale was attended by numerous parties, and the Foreclosure Purchasers bid the high amount. See Exhibit M, Affidavit of David Fingerhut at ¶¶ 4-5. Finally, after purchasing the property, the Foreclosure Purchasers ordered an appraisal on the Property. Id. at ¶ 10. The appraisal was performed by an appraiser that is unrelated to the Foreclosure Purchasers and for the purpose of obtaining market value title insurance. It sets the fair market value as of January 19, 2012 at \$17,000. See Exhibit M, Affidavit of Fingerhut at ¶ 12; Exhibit N, Appraisal. The appraisal was not part of an effort to show a depressed value of the Property. On the contrary, it was ordered before the foreclosure sale was challenged by the Defendants and the Foreclosure Purchasers. In fact, the Foreclosure Purchasers were “disappointed with the valuation,” a sentiment they described in an email to the foreclosure attorneys on January 26, 2012. See Exhibit O, Email from Patricia Santry and David Fingerhut to Julie Serafino, dated January 26, 2012.

Based on the more recent and accurate valuations from the 2010 tax sale, the foreclosure sale, and the 2012 appraisal, the amount paid by the Foreclosure Purchasers is anywhere between 68% and over 100% of the actual value of the Property. This falls far short of the 10% threshold established in Eastern Savings Bank. Therefore, the amount paid at the foreclosure sale does not “shock the conscience” and does not warrant vacating the foreclosure sale and voiding the Master-in-Equity Deed.

II. The Foreclosure Purchasers are good faith purchasers for value.

South Carolina Code Ann. § 15-39-870 provides that judicial sales are res judicata as to innocent purchasers:

¹ The Property was later redeemed by the Defendants.

Upon the execution and delivery by the proper officer of the court of a deed for any property sold at a judicial sale under a decree of a court of competent jurisdiction that proceedings under which such sale is made shall be deemed res judicata as to any and all bona fide purchasers for value without notice, notwithstanding such sale may not subsequently be confirmed by the court. Judicial sales shall be res judicata as to innocent purchasers, even without confirmation.

The rationale for the statute is the well established public policy of protecting good faith purchasers and upholding the finality of a judicial sale. Robinson v. Estate of Harris, 378 S.C. 140, 144, 662 S.E.2d 420, 422 (Ct. App. 2008). In Robinson, as in the present case, the defaulting owners of the subject property sought to vacate the foreclosure sale due to ineffective service. Id. The Court noted that the bona fide purchaser submitted documents from the court file demonstrating that (1) service was made upon defendants; (2) both defendants were in default; (3) the attorneys of record were notified of the hearing; and (4) neither defendants were in the United States military service. Id. at 145, 662 S.E.2d at 423. The purchaser also produced the master's deed. Id. The Court further noted that the purchaser had satisfied all of the elements to be considered a bona fide purchaser for value: (1) actual payment of the purchase price of the property, (2) acquisition of legal title to the property, or the best right to it, and (3) a bona fide purchase, "i.e., in good faith and with integrity of dealing, without notice of a lien or defect." Id. The Court also stated that affidavits submitted by the defaulting owners were insufficient because they were not matters of record at the time of the foreclosure sale. Id. at 146.

Likewise, in Cumbe v. Newberry, 251 S.C. 33, 37, 159 S.E.2d 915, 917 (1968), the Supreme Court of South Carolina considered whether a foreclosure sale should be set aside where notice of a resale had not been given to the parties to the action. The Court held that "a purchaser in good faith at a judicial sale is not affected by irregularities in the proceedings or even error in the judgment, under which the sale is made; but is required at his peril only to make inquiry as to the jurisdiction of the court which ordered the sale, and whether all proper parties were before the court when the order was made." Id.

In the present case, the Court file at the time of the foreclosure sale reflected that the Defendants had been served in accordance with the Order of Publication, were in default, had received notice, and were not in military service. Further, the Foreclosure Bidders were good faith purchasers. They made actual payment of the purchase price at the foreclosure sale. They

acquired titled through the Master in Equity Deed. Finally, they had no notice of any impropriety or irregularity in the foreclosure process and therefore took title in good faith and with integrity of dealing, without notice of a lien or defect. See Exhibit M, Affidavit of David Fingerhut at ¶ 6. Therefore, pursuant to South Carolina Code Ann. § 15-39-870, the Foreclosure Purchasers are good faith purchasers for value and the proceedings are *res judicata*.

III. The Plaintiff complied with the Order for Publication by forwarding a copy of the Summons and Complaint in the United States mail, postage prepaid, addressed to the last know address of the Defendants.

Contrary to Defendants' assertions, attorneys for the Plaintiff did forward a copy of the Summons and Complaint by the United States mail, postage prepaid, to the Defendants at their last known address. See Exhibit D, July 21, 2011 Letter to Defendants. This letter was sent to Defendants at the same address they claim in the affidavits filed with their motion. See Exhibit P, Affidavit of Julie Serafino (affirming that she attached the Summons and Complaint to the letter identified as Exhibit D). Therefore, the Plaintiff fully complied with the Order of Publication and the foreclosure sale need not be set aside.

IV. Defendants' claims are barred by the doctrine of laches.

Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Byars v. Cherokee County, 237 S.C. 548, 118 S.E. (2d) 324 (1961). Whether a claim is barred by laches is to be determined in light of facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute laches. Arceneaux v. Arrington, 284 S.C. 500, 327 S.E. (2d) 357 (Ct. App. 1985). In the present case, the Sheriff of Chester County, Pennsylvania attempted to serve the Defendants on four separate occasions between May 31, 2011 and June 14, 2011. See Exhibit B. Counsel for the Plaintiff then published the Lis Pendens, Summons and Complaint for three weeks in *The Island Packet*. See Exhibit E. After that, counsel for the Plaintiffs mailed four separate notices of this action to the Defendants, directed to the address at which the Defendants claim to reside in their own affidavits attached to their motion. The mailings occurred as follows:

- July 21, 2011 letter attaching the Civil Action Coversheet, Certificate of Exemption from Administrative Order, Lis Pendens, Summons, Complaint, Affidavit for Order

of Publication, Motion and Order Information Form and Cover Sheet, Order for Publication, and Notice of Filing Complaint. (Letter attached as Exhibit D);

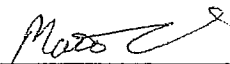
- September 12, 2011 letter attaching copies of the Motion and Order Information Form and Cover Sheet, Motion and Order of Default and Reference and Affidavit of Non-Military Service. (Certificate of Mailing attached as part of Exhibit Q);
- November 15, 2011 letter attaching copies of the Notice of Hearing. (Certificate of Mailing attached as part of Exhibit Q); and
- December 7, 2011 letter attaching copies of the Form 4, Master's Report and Judgment of Foreclosure and Sale, Affidavit in Support of Attorneys' Fees and Costs, Transcript of Testimony and Notice of Foreclosure Sale. (Certificate of Mailing attached as part of Exhibit Q).

In addition to each of these notices and mailings, counsel for the Plaintiff also published the Notice of Foreclosure Sale in the Island Packet/Beaufort Gazette for three weeks in December 2011. See Exhibit R, Affidavit of Publication.

The Defendants claim to live at the very address to which four letters were sent by the Plaintiff's attorneys. It appears that the Defendants simply chose to ignore all of these letters instead of responding prior to the foreclosure sale and issuance of the Master-in-Equity Deed to the Foreclosure Purchasers. The Defendants unreasonably neglected their right to appear in this action prior to the foreclosure sale and issuance of the deed. Having done so, the Plaintiff has spent thousands of dollars completing the process, the Court has expended valuable time and resources, and Foreclosure Purchasers have not only paid for the Property, but have also expended additional funds on an appraisal and title insurance. Because the Defendants' unreasonable delay has worked a prejudice on the Plaintiff, the Court and the Foreclosure Purchasers, their prayer for equitable relief must be denied.

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May 9, 2012
Charleston, South Carolina

*ATTORNEYS FOR DEFENDANTS DAVID L. FINGERHUT
AND PATRICIA M. SANTRY*

Defendants.

**NOTICE OF MOTION AND MOTION
TO RECONSIDER DENIAL OF
DEFENDANTS' MOTION TO SET ASIDE
FORECLOSURE SALE, VOID
MASTER IN EQUITY DEED, AND
VACATE/SET ASIDE ORDER**

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unable to serve the Defendants during those four (4) attempts, the Plaintiff sought to publish notice under South Carolina Code of Laws § 15-9-710, *et seq.*

The Plaintiff then obtained an order for publication from the Clerk of Court, which stated, among other things, "that a copy of the Summons and Complaint be forwarded to said Defendants by depositing the same in the United States mail, postage prepaid, addressed to the last known address of said Defendants." Although the Plaintiff claims to have mailed a copy of the Summons and Complaint to the Defendants at their last known address in Pennsylvania, the Court's file in the underlying foreclosure action has no evidence that a copy of the Summons and Complaint was ever mailed to the Defendants. Pursuant to the Order for Publication, the Plaintiff proceeded to publish notice of the foreclosure action in *The Island Packet*, a newspaper located in Beaufort County, South Carolina.

On December 2, 2011, the Honorable Judge Dukes conducted a hearing, which resulted in the entry of the Master's Report and Judgment of Foreclosure and Sale. Fingerhut and Santry purchased the property at the foreclosure sale on January 3, 2012. Upon receipt of a letter from the Honorable Judge Dukes that the property had been sold, which was the Defendants' first notice that the property had been foreclosed, the Defendants filed their Notice of Motion and Motion to Vacate/Set Aside Foreclosure Sale, Void Master in Equity Deed, and Vacate/Set Aside Order.

Arguments for the Defendants' Motion was heard on May 14, 2012, and on July 24, 2012, Judge Dukes issued his Order denying the Defendants' Motion to Vacate/Set Aside Foreclosure Sale, Void Master in Equity Deed, and Vacate/Set Aside Order. The Defendants hereby move this Honorable Court to alter, amend and/or reconsider the ruling.

Standard of Review

The South Carolina Rules of Civil Procedure grant a party leave to file a motion to alter or amend a judgment “in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State [...]; the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law, or make new findings or conclusions, and direct the entry of a new judgment.” Rule 59, SCRCP.

Sales price “shocks the conscience”

“[T]he determination of whether a judicial sale should be set aside is a matter left to the sound discretion of the trial court.” Eastern Savings Bank, FSB v. Sanders, 373 S.C. 349, 354, 644 S.E.2d 802, 805 (Ct. App. 2007) (citing Investors Sav. Bank v. Phelps, 303 S.C. 15, 397 S.E.2d 780. “A judicial sale will be set aside when either: (1) the sale price ‘is so gross as to shock the conscience[;]’ or (2) the sale ‘is accompanied by other circumstances warranting the interference of the court.’” Wells Fargo Bank, N.A. v. Turner, 378 S.C. 147, 150, 662 S.E.2d 424, 425 (Ct. App. 2008) (citing, Poole v. Jefferson Standard Life Ins. Co., 174 S.C. 150, 177 S.E. 24 (1934). “Since the opinion in Poole, our courts have continued to set aside judicial sales based on ‘grossly inadequate’ sales prices.” Id. [referring to Investors Sav. Bank v. Phelps, 303 S.C. 15, 397 S.E.2d 780 (Ct. App. 1990)](stating that sales prices amounting to 4.2%, 4.4%, and less than 10% of the property value all fall within the percentage range of a grossly inadequate sales price).

In our case, Defendants paid \$201,500.00 for the subject property (see Exhibit “A”). At the foreclosure sale on January 3, 2012, and as set forth more specifically in the Master In Equity Deed, the successful foreclosure bidders, David L. Fingerhut and Patricia M. Santry, paid \$8,800.00 for the property. The sales price in our case was 4.37% of the amount paid by Defendants. The sales price

that Fingerhut and Santry paid for the subject property “is so gross as to shock the conscience” (emphasis added), and squarely fits into the percentage range set forth in Investors Sav. Bank. If the foreclosure sale is allowed to go through, the Defendants stand to lose the more than \$200,000.00 that they invested in the property, for which one day they may be able to recover.

Fingerhut and Santry have argued that the bids submitted at a tax sale and the foreclosure sale are indicative of the property value. However, it is not reasonable to expect that potential purchasers would pay full price, or even half of the full price, at a tax or foreclosure sale. It is common knowledge that interested buyers placing bids at a tax or foreclosure sale are looking for drastically reduced prices. If it was the intention of the Court of Appeals to use bids at a tax or foreclosure sale, then there would be no need to apply the “so gross as to shock the conscience” standard. Further, the Court of Appeals, in a case cited by Fingerhut, stated that the amount set forth in the foreclosed note and mortgage is evidence of the property’s value (see, Wells Fargo Bank, NA v. Turner, 378 S.C. 147, 151, 662 S.E.2d 424, 426 (Ct. App. 2008)). It is only fair to assume that the amount that a party pays at an actual point of sale, and not the amount that bargain hunters bid at a tax or foreclosure sale, is more determinative of the property’s value.

Additionally, at the motion hearing, the Defendants produced an appraisal which valued the property at \$140,000.00 (See Exhibit “B”). Two of the comparables listed in the Defendants’ appraisal are located in Bloody Point, with both lots being located less than a half mile away. The two lots in Bloody Point sold for \$360,000.00 and \$363,400.00, on October 23, 2011 and June 13, 2011, respectively. Although the two lots are ocean front, the subject lot is “second row ocean.” The third lot used as a comparable in the Defendants’ appraisal, located just over 1.5 miles away, sold for \$315,000.00 on November 14, 2011. While it is understandable to expect the subject property to be affected by current market conditions, it is unreasonable to value the subject property

at \$17,000.00, as Fingerhut's and Santry's appraisal did, when two lots in the same neighborhood and less than a half of a mile away sold for more than \$360,000.00 within the last year. Said appraisal not only takes into account actual sales in the depressed market, but at the same time considers rejuvenation efforts by the current owner after the bankruptcy sale of several planned unit developments and golf communities located on Daufuskie Island.¹ However, since the sale of the property, Daufuskie Island has been going through a period of rejuvenation, which has increased the value of the properties. As stated above, these efforts to rejuvenate Bloody Point and other properties on Daufuskie Island were one of many factors considered in the appraisal submitted by the Defendants.

The Defendants also presented evidence of the property's value as determined by the Beaufort County assessor, which valued the property at \$140,000.00 (See Exhibit "C"). It should be noted that the subject property has always been undervalued by the assessor, as it was valued at \$85,000.00 in 2002, the year after the Defendants purchased the property for \$201,500.00. As such, it is reasonable to expect that the property is actually worth more than the value of the appraiser and the assessor. However, even if we use \$140,000.00 as the determinative value of the property, Fingerhut and Santry still only paid 6.28% of the value of the property, which is less than the 10% threshold.

Fingerhut and Santry did produce an appraisal at the motion hearing in support of their opposition to the Defendants motion, which valued the property at \$17,000.00 (see Exhibit "D"). However, Fingerhut did not agree with the appraisal, and even questioned the valuation of the property to his attorney. In an email dated January 26, 2012, Fingerhut stated "Attached is our

¹Bloody Point, along with several other developments on Daufuskie Island, was sold in 2011 by Bankruptcy Trustee, Robert C. Onorato, in the Daufuskie Island Properties, LLC, bankruptcy action (Case # 09-00389-jw).

appraisal. Frankly, we're a bit disappointed with the valuation, but the appraiser said the problem is that the only current sales are generated by banks at the moment so prices are very low. Oddly enough the appraisal fails to mention proximity to the ocean as a recreational amenity." (emphasis added) (see Exhibit "E").

There are several deficiencies with Fingerhut's appraisal when compared to that of the Defendants. For instance, none of the lots in Fingerhut's appraisal are located in Bloody Point. As pointed out by Fingerhut, his appraisal failed to consider the lot's close proximity to the beach as an indicator of value, and further, the appraisal only relied on "sales generated by the banks." A further review of Fingerhut's appraisal also shows that the appraiser did not consider the current rejuvenation efforts. Conversely, the Defendants' appraisal was based on the sale of lots located in Bloody Point, with consideration being given to the lot's close proximity to the beach and the rejuvenation efforts currently taking place on Daufuskie Island.

For arguendo, assuming Fingerhut's appraisal of \$17,000.00 is accurate, which is vehemently disputed, Fingerhut still purchased the lot for only 51.76% of the property value. That in itself is indicative that basing the property value on a tax and/or foreclosure sales price is flawed in determining property value.

It is reasonable to assume that no one would allow a piece of property in which they paid close to a quarter of a million dollars go to auction for \$8,800.00. As such, because the sales price was **"so gross as to shock the conscience,"** and because the sale was **"accompanied by other circumstances warranting the interference of the court,"** as set forth more specifically below, the foreclosure sale of January 3, 2012 should be vacated/set aside, and the Master in Equity Deed dated January 6, 2012, which was recorded on January 11, 2012 in the Office of the Register of Deeds for Beaufort County, South Carolina, in Book 3111 at Page 1291 should be voided.

Violation of Due Process

“The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.” Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 561, 505 S.E.2d 598, 603 (Ct. App. 1998). Due process demands “notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights. A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on.

Webster v. Clanton, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972).

In order to commence an action, Rule 4 of the South Carolina Rules of Civil Procedure requires copies of the Summons and Complaint to be served on each Defendant. “Rule 4, SCRPC, serves at least two purposes. It confers personal jurisdiction on the court and assures the Defendant of reasonable notice of the action.” Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995). “A judgment is void . . . if a court acts without [personal] jurisdiction.” Thomas & Howard Co. v. T.W. Graham & Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995).

Rule 55(c) states “[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).” Rule 60(b)(4) provides that “[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding [because] . . . the judgment is void.”

The Defendants were not personally served with
the Summons and Complaint, so the
Court acted without jurisdiction

In our case, the Defendants were never personally served with the Summons or Complaint. The Plaintiff produced an affidavit of service from Corporal Kurt Hansen ("Hansen") of the Chester County Pennsylvania Sheriff's Office, which states that Hansen made four attempts to serve the Defendants, but was unsuccessful. However, those four attempts at serving the Defendants only occurred during a two (2) week period, and three of those attempts were made during morning business hours, while both Defendants were at work. Had Hansen left his card at the Defendants' residence, then the Defendants would have contacted him to make arrangements for service. Further, the Plaintiff could have easily hired a private process server who would have attempted service before or after normal business hours. The Plaintiff has wrongfully asserted that the Defendants were "dodging" service. However, **the Defendants would reiterate that three of the four service attempts, which were made on May 31, 2011 at 11:32 a.m., June 6, 2011 at 9:50 a.m., and June 14, 2011 at 11:30 a.m., were during normal business hours on week days.** Even when the fourth attempt was made on June 6, 2011 at 7:08 p.m., it is reasonable to expect that an individual may not be home at that time. The Defendant, William Ashton, is a doctor and usually leaves for work at 6:45 a.m., and the other Defendant, Michele Ashton, usually leaves for work before 8:00 a.m., as indicated by their affidavits in the Court's file. The Plaintiff could have easily hired a private process server, who would have made several attempts to serve the Defendants prior to or after normal business hours, and on the weekend.

The Plaintiff's attempt to serve the
Defendants by publication did not comply with
South Carolina Code of Laws § 15-9-710, et seq.
so the Court acted without jurisdiction

The Plaintiff has argued that Defendants were properly served by publication. However, South Carolina Code of Laws § 15-9-710, *et seq.*, sets forth very specific guidelines when service by publication upon an out-of-state defendant is made. An out-of-state defendant may be served by publication “when the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State and (a) that fact appears by affidavit to the satisfaction of the court or judge thereof” S.C. Code of Laws § 15-9-710. However, “the order of publication shall direct the publication to be made in one newspaper . . . **most likely to give notice to the person to be served . . . [and] the court . . . shall also direct that a copy of the summons be forthwith deposited in the post office directed to the person to be served at his place of residence. . . .**” S.C. Code of Laws § 15-9-740 (emphasis added).

In Brown v. Malloy, 345 S.C. 113, 546 S.E.2d 195 (Ct. App. 2001); the Plaintiff was unable to locate the Defendant, so the Family Court directed that service be effectuated through publication of the proceedings in a newspaper of general circulation in Los Angeles County, California. Brown, 546 S.E.2d at 197. However, the Defendant resided in Orange County, California, and the newspaper in which the notice was published was allegedly not circulated in Orange County. After failing to attend the hearing, the Family Court terminated the Defendant’s parental rights. Id. Subsequently, the Defendant filed a motion to set aside the adoption, on the premise that he had not been properly served. Id. Because the Family Court refused to determine whether the publication was adequate to provide notice of the proceedings, the Defendant argued that he was entitled to a hearing to determine whether or not the publication was sufficient to provide notice of the

proceedings. The Court of Appeals remanded the case to the Family Court to determine whether or not “the notice as published was inadequate because it failed to meet the requirements of due process.” Brown, 546 S.E.2d at 202.

The Court of Appeals was unable to decide whether or not the issuance of the order of publication was proper, but the Court did hold that the Family Court erred in failing to determine whether service by publication gave the Defendant adequate notice of the proceedings. Brown, 546 S.E.2d at 199.

The Court of Appeals further discussed whether or not the Plaintiff complied with S.C. Code of Laws § 15-9-740. “The Order of Publication required that notice be published in a newspaper of general circulation in ‘the county where . . . the biological father is last known to reside.’” Brown, 546 S.E.2d at 201, 202. In its opinion, the Court of Appeals stated that “the order erroneously designated Los Angeles as the proper county . . . [because the Defendant alleged] the publication should have been in a newspaper of general circulation in Orange County, where he actually resided” Id. The Court of Appeals stated that “[s]uperimposed upon the requirements of the Order of Publication is the mandate of section 15-9-740, which requires publication in a newspaper ‘most likely to give notice to the person to be served.’” Id. (emphasis added).

The Plaintiff, knowing that the Defendants resided in Chester County, Pennsylvania, published the Notice of the Summons and Notice of Filing Complaint in *The Island Packet*, a newspaper located in Beaufort County, South Carolina. In our case, the Plaintiff’s attempt to provide the Defendants notice via publication in *The Island Packet* was far more inadequate to give the Defendants notice of the foreclosure than the Plaintiff’s attempt in Brown. In Brown, Los Angeles County and Orange County are in close proximity to each other, and the issue arose as to whether

the newspaper was also circulated in Orange County. However, in our case, Beaufort County, South Carolina, and Chester County, Pennsylvania, are more than 600 miles from each other. There is no dispute that *The Island Packet* is not circulated in Chester County, Pennsylvania. Although the Plaintiff was, or should have been, well aware that the Defendants resided in Chester County, Pennsylvania (see, i.e. the various “certificates of mailing” filed by the Plaintiff in the Court’s file and the notice address on the Beaufort County Treasurer’s website in Exhibit “C”), it is reasonable to expect that a newspaper of general circulation in Beaufort County, South Carolina, would not be a newspaper “most likely to give notice” to the Defendants. As such, the Plaintiff failed to comply with S.C. Code of Laws § 15-9-710, *et seq.*

It appears that in publishing the Summons and Notice of Filing Complaint in *The Island Packet*, the Plaintiff erroneously relied on S.C. Code of Laws § 15-9-720(B)(1), which states that “a court shall grant an order allowing a party with an interest in or a lien on a parcel of real property subject to . . . [an] action affecting the property’s title to serve by publication. . . (2) in the county where the property is situated.” However, that section applies to “unknown parties,” and does not apply to parties who are known to the Plaintiff. Because the Plaintiff knew who these Defendants were, and knew where they resided, publication in Beaufort County, South Carolina was not proper. Publication in *The Daily Local News*, a newspaper of general circulation in Chester County, Pennsylvania, would have given the Defendants proper notice of the pending action.

Although an unpublished opinion, Trico Engineering Consultants v. Kozlowski, 2010-UP-5111 (SCCA) provides insight on the procedures necessary to effectuate service under S.C. Code of Laws § 15-9-710, *et seq.* In Trico, the Plaintiff, after several unsuccessful attempts to serve the Defendant, sought an order for service by publication. The order of publication specifically required

that a copy of the pleadings be mailed to the Defendant at his last known address. Although the Defendant's current address was unknown, the Plaintiff did have a "last known address" for the Defendant. Despite having the Defendant's last known address, the Plaintiff mailed the pleadings to a post office box, which was not mentioned in the order, nor was the post office box disclosed to the Plaintiff as an appropriate address for the Defendant. Because he never received notice of the Summons and Complaint, and failed to appear in the case, an order of default was entered against the Defendant. The Defendant asserted that the Plaintiff's failure to comply with S.C. Code of Laws § 15-9-740 rendered the service by publication invalid. However, the Circuit Court upheld the default judgment, and refused to grant relief to the Defendant under Rule 60(b)(1) and (4), SCRCP.

The Court of Appeals reversed the Circuit Court's decision and found that "service was not proper when Trico failed to comply with the specific mailing requirement of the circuit court's order." Trico, 2010-UP-5111 (SCCA). In reaching its decision, the Court of Appeals cited numerous authority in support of same. [see, i.e., Tenney v. Am. Pipe Mfg. Co., 96 F. 919 (D.S.C. 1899) (service by publication is in derogation of the common law, and **the statute must be strictly construed**) (emphasis added); Brown v. Malloy, 345 S.C. 113, 126-127, 546 S.E.2d 195, 201-201 (Ct. App. 2001) (**finding notice would be insufficient for due process purposes when order of publication erroneously designated county where defendant did not reside as the proper county for publication and when notice was published in a newspaper of general circulation in improper county**) (emphasis added); McGloob v. Gwynn, 100 P.3d 621, 625 (Idaho 2004) (**finding failure to comply with mailing requirement of rules of civil procedure in effecting service by publication required default judgment be set aside as service was invalid**) (emphasis added); In re Marriage of Wilson, 502 N.E.2d 447, 449 (Ill. App. 1986) (holding failure to mail a

copy of the publication to respondent's last known address as stated in the affidavit and required by relevant statute rendered service by publication invalid when strict compliance with the statute mandated mailing of the notice as a relevant part of the publication process); Sink v. Easter, 202 S.E.2d 138, 141 (N.C. App. 1974) (finding Plaintiff's failure to mail defendant copy of the notice of divorce when the service was by publication, as required by the statute, rendered service of process by publication invalid); Sanders v. Sanders, 278 A.2d 615, 618, (Md. App. 1971) (stating in divorce proceeding "where a statute requires not only a publication but also that a copy of the petition be mailed by registered mail to the defendant at his or her last known address, the mailing is as much a part of the service as the publication, and where there is a publication but there is no mailing, or the plaintiff causes a notice to be mailed to a false address, the service is void. The mere fact that the defendant has actual notice of the institution of the proceedings against him is not sufficient to give the court jurisdiction where the plaintiff has not complied substantially with the statutes on constructive service.") (quoting 24 Am.Jur.2d, Divorce and Separation § 286); Anderson v. Anderson, 82 N.E. 311, (Ill. 1907) (finding failure to mail notice of publication to the last known residence when notice mailed to 5857 State Street, Chicago, IL, rather than 5559 State Street, as stated in the affidavit, was insufficient to confer jurisdiction)].

As stated above, the Order for Publication, which was filed on July 11, 2011, specifically states "that a copy of the Summons and Complaint be forwarded to said Defendants by depositing the same in the United States mail, postage prepaid, addressed to the last known address of said Defendants." A review of the Court's file quickly indicates that the Plaintiff did not mail a copy of the Summons and Complaint to the Defendants. It should be noted that the Plaintiff filed a certificate of mailing for the Motion and Order of Default and Reference and Affidavit of Non-Military Service, Notice of Hearing,

Form 4, Master's Report and Judgment of Foreclosure and Sale, Affidavit in Support of Attorney's Fees and Costs, Transcript of Testimony, and Notice of Foreclosure Sale. However, the Plaintiff did not file a certificate of mailing for the Summons and Complaint to ensure that the Court had jurisdiction over the Defendants.

In the underlying foreclosure action, the Court's file contains no evidence that the Plaintiff served the Defendants with a copy of the Summons and Complaint. Instead, at the motion hearing, over the objection of counsel for the Defendants, the Court allowed the Plaintiff to admit a letter and affidavit, which affidavit was executed on May 8, 2012, almost a year after the case was filed, from Julie Serafino, Esquire, which states that she did mail a copy of the Summons and Complaint to the Defendants' last known address in Chester County, Pennsylvania.

The Plaintiff, Fingerhut, and Santry would like the Court to find that Corporal Hansen's attempt to serve the Defendants at their residence in Pennsylvania was sufficient to justify publication under the statute. However, that reasoning, along with the Plaintiff's, Fingerhut's, and Santry's argument that the Plaintiff satisfied the mailing requirement of the publication statute, is in direct contradiction to their argument that a newspaper in Beaufort County was most likely to give notice to the Defendants of the pending action. The Defendants would assert that it is impossible to find that the Plaintiff complied with the publication statute when the Plaintiff only attempted to serve the Defendants in Pennsylvania, mailed the Summons and Complaint to the Defendants' residence in Pennsylvania, but, at the same time, published notice of the proceeding in Beaufort County, South Carolina. As stated above, it is clear that the Plaintiff knew that the Defendants resided in Chester County, Pennsylvania (see, i.e. see Affidavit of Service from Hansen, various certificates of mailing in Court's file, Exhibit "C"), but went ahead and published notice in Beaufort County, South Carolina.

The Plaintiff, Fingerhut, and Santry argued that the Defendants had notice that the assessments were due, and that the Defendants had notice of the pending foreclosure action. However, as stated above, Daufuskie Island Properties, LLC, which owned Bloody Point, was in bankruptcy since 2009, with the property owners association being virtually nonexistent. In fact, several years ago, the Defendants received written notice that the association was no longer operating. Even so, **“the mere fact that the defendant has actual notice of the institution of the proceedings against him is not sufficient to give the court jurisdiction where the plaintiff has not complied substantially with the statutes on constructive service.”** (emphasis added) *Sink v. Easter*, 202 S.E.2d 138, 141 (N.C. App. 1974) [cited in *Trico*, 2010-UP-5111 (SCCA)]. Simply stated, **notice does not equal jurisdiction.**

Because the Defendants were not personally served with the Summons and Complaint, and because the Plaintiff failed to comply with S.C. Code of Laws § 15-9-710, *et seq.*, the Honorable Judge Dukes’s Order of December 2, 2011 is void due to a lack of personal jurisdiction over the Defendants, and therefore, must be set aside.

**Fingerhut and Santry had a duty to ensure
that the Court had jurisdiction over the Defendants**

“[O]ur decisions have applied the general rule, . . . , that a purchaser in good faith at a judicial sale is not affected by irregularities in the proceedings or even error in the judgment under which the sale is made; but **is required at his peril only to make inquiry as to the jurisdiction of the court which ordered the sale, and whether all proper parties were before the court when the order was made.**” (emphasis added) (*Cumbe v. Newberry*, 251 S.C. 33, 37, 159 S.E.2d 915, 917 (1968)). “The purchaser in good faith at a judicial sale is bound only to see that the court had jurisdiction of the subject of the action and of the parties in interest.” *Bennett v. Floyd*, 237 S.C. 64, 70, 115 S.E.2d 659, 662 (1960). As stated above, there is no evidence in the underlying foreclosure action that the Defendants were ever

served, either personally or through the mail, with the Summons and Complaint, nor that notice was published in a newspaper most likely to give notice to the Defendants.

Fingerhut, as an attorney with over 25 years of real estate experience, and as an investor of several foreclosed properties in Beaufort County, was more than qualified to make this determination, but failed to do so. Fingerhut candidly admits that he did not review the Court's file prior to purchasing the property in order to determine if the Court acted with jurisdiction. In his affidavit (Exhibit "F"), Fingerhut states, "I reviewed the notice of foreclosure sale for Lot # 55, Daufuskie Island Club Phase I, Bloody Point and attended the foreclosure sale held on January 3, 2012." Further, Fingerhut states, "When I first learned of the Plaintiffs' claims, well after the closing of title to the Property, I personally conducted an investigation in order to learn . . . how they could have forfeit [sic] their rights to the Property." (emphasis added). A review of the closing statement, which was submitted as an exhibit to Fingerhut's and Santry's memorandum in opposition to the current motion, indicates that a title abstract was not performed until after the foreclosure sale. As stated in the cases cited above, it was incumbent upon Fingerhut to investigate prior to taking title to the property; however, at his own "peril," Fingerhut waited until after he took title to make such an inquiry.

Fingerhut and Santry claim that they are "good faith purchasers for value," and therefore, they argue that the foreclosure sale should be upheld. However, had Fingerhut and Santry actually reviewed the Court's file prior to the sale, rather than after the sale, they would have known that the Defendants resided in Pennsylvania, and that notice was improperly published in Beaufort County, South Carolina. As stated above, such a review of the Court's file would have shown that publication in Beaufort County was not "a newspaper most likely to give notice" to the Defendants, and that the Court did not have jurisdiction over the Defendants. As such, Fingerhut and Santry cannot be considered bona fide purchasers when the public record contained adequate notice that the foreclosure proceedings were defective.

Conclusion

Based on the above, the Defendants would ask the Court to reconsider its Order, dated July 24, 2012, denying the relief sought in the Defendants' Notice of Motion and Motion to Vacate/Set Aside Foreclosure Sale, Void Master in Equity Deed, and Vacate/Set Aside Order, and instead, issue an Order granting Defendants motion to: (1) vacate/set aside the foreclosure sale of January 3, 2012; (2) void the Master in Equity Deed dated January 6, 2012, which was recorded on January 11, 2012 in the Office of the Register of Deeds for Beaufort County, South Carolina, in Book 3111 at Page 1291; and (3) set aside and/or vacate the Honorable Judge Dukes's Order of December 2, 2011 be set aside and/or vacated.

Respectfully submitted,

LAW OFFICES OF JAMES F. BERL, P.C.

By:



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Hilton Head Island, SC
July 25, 2012

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Bloody Point Property Owners' Association, Inc.,)
David L. Fingerhut and Patricia Santry,)

Plaintiff,)

vs.)

William A. Ashton, Jr. and Michele C. Ashton,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-07-2176

PLAINTIFFS DAVID L. FINGERHUT
AND PATRICIA SANTRY'S
MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO
RECONSIDER

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S.C.

David L. Fingerhut and Patricia M. Santry ("Fingerhut Plaintiffs"), hereby file their memorandum in opposition to Defendants' Motion to Reconsider Denial of Defendants' Motion to Set Aside Foreclosure Sale, Void Master-in-Equity Deed, and Vacate/Set Aside Order.

Defendants' motion is simply a reiteration of the arguments previously asserted in the briefs on file and in the May 14, 2012 hearing on Defendants' motion to vacate. Defendants have not supplemented their arguments with any additional documents or case law. The Court has already denied the Defendants' arguments once and the Fingerhut Plaintiffs request that the Court adopt the rulings set forth in its July 24, 2012 Order and deny the Defendants' Motion to Reconsider, for the following reasons:

ARGUMENT

1. The foreclosure sales price does not "shock the conscience."

The parties appear to agree that the threshold for determining whether the sales price is so inadequate that it "shocks the conscience of the court" occurs when the actual sales price is less than 10% of the actual value of the property. See Eastern Savings Bank, FSB v. Sanders, 373 S.C. 349, 359, 644 S.E.2d 802 (Ct. App. 2007) (cited in Plaintiffs' Memorandum in Opposition to Motion to Vacate); see also Defendants' Motion to Reconsider at p. 5). Therefore, the only

two issues to be determined are: (1) the amount of the sales price; and (2) the market value of the property on the date of the sale, January 6, 2012.

a. The actual sales price was \$11,593.20.

The Fingerhut Plaintiffs assert that the Court should add the amounts they paid for past due HOA assessments and property taxes (\$2,793.20) to the prevailing foreclosure bid (\$8,800) when determining the amount of the actual sales price. The Court agreed that these items were necessary to secure the property unencumbered, and determined that the actual sales price was \$11,593.20. See 7/24/12 Order at pp. 3-4. The Defendants did not challenge this portion of the Order in their Motion to Reconsider. As such, the actual value of the property on the day of sale would need to exceed ten times that amount – \$115,932.00 – in order to meet the threshold required to “shock the conscience” of the Court.

b. The actual value of the property is far less than \$115,932.00.

In support of their argument, the Defendants reiterate the same arguments made in support of their original motion. Specifically, they cite: (1) the amount paid for the property in 2001; (2) the value placed on the property by the tax assessor; and (3) the value placed on the property in the appraisal commissioned by the Defendants specifically for this lawsuit. As the Court determined in its July 24, 2012 Order, these indicia of value are unreliable and inferior to the evidence presented by the Fingerhut Plaintiffs.

The subject property is an interior lot on Daufuskie Island. The Defendants purchased the property in 2001 for \$201,500. See Exhibit A to Defendants’ Motion to Reconsider. As the Court is aware, property values on Daufuskie Island have declined significantly in the past few years, such that this purchase price may not be relied upon to establish the value of the property on January 6, 2012. Second, the appraisal produced by the Defendants¹ is unreliable because it was commissioned for the express purpose of establishing a favorable valuation for this lawsuit and because the appraiser did not use actual sales of comparable lots when reaching her conclusion. See Exhibit B to Defendants’ Motion to Reconsider at p. 6 (“Intended use is to rebut

¹ The appraisal submitted by the Defendants purports to value the property as of April 3, 2012 rather than the sale date of January 6, 2012.

the 1/06/2012 sale and sales price of the subject property at \$8,800 . . .”); See Defendants’ Motion to Reconsider at pp. 4-5 (noting the only actual sales used were all for oceanfront lots of substantially larger size).² In addition, the remainder of Defendants’ self-serving appraisal relies on real estate listings rather than actual sales. Finally, the value placed on the property by the tax assessor has not been updated since 2009, is not a reliable indicator of actual market value, and is therefore unreliable. See Exhibit C to Defendants’ Motion to Reconsider.

In contrast, the Fingerhut Plaintiffs provided documentation containing reliable and current valuation information on the subject property. The appraisal provided by the Fingerhut Plaintiffs – in which the appraiser concluded that the fair market value of the subject property was \$17,000 – was commissioned to establish a value for title insurance. See Affidavit of David Fingerhut at ¶ 12 (Exhibit M to Plaintiffs’ Memorandum in Opposition to Motion to Vacate) (exhibits to prior memorandum attached for reference). Unlike the Defendants’ appraisal, the Fingerhut Plaintiffs’ appraisal was procured for a purpose wholly unrelated to this lawsuit and not for the express purpose of challenging or supporting the sales value. It is therefore more reliable. Further, the appraisal is based on actual sales comparisons to similar interior lots on Daufuskie Island, including one second row lot (these recent comparable sales were disregarded by Defendants’ appraiser). See Exhibit D to Defendants’ Motion to Reconsider.

In addition, the Fingerhut Plaintiffs cited the price paid for the subject property at a 2010 tax sale (\$10,000) and the amount paid at the foreclosure sale. See Tax Sale Notice (Exhibit L to Plaintiffs’ Memorandum in Opposition to Motion to Vacate Bidder Redemption Notification). Contrary to the arguments made by the Defendants, these amounts are clearly relevant indicia of the value of the subject property on the date of the foreclosure sale. Bennett v. Price, 237 S.C. 64, 73, 115 S.E.2d 659, 664 (1960) (tax sale); Eastern Savings Bank, 373 S.C. at 353, 644 S.E.2d at 804 (tax appraisals); Wells Fargo Bank, N.A. v. Turner, 378 S.C. 147, 662 S.E.2d 424 (Ct. App. 2008) (testimony of bidder).

² Also note that two of the three oceanfront sales used by the Defendants’ appraiser had depreciated by approximately 70% since previous sales prior to the 2008 recession. Exhibit B to Defendants’ Motion to Reconsider at p. 2 (comparables 1 and 3). If that same percentage were applied to the \$201,500 paid by the Defendants prior to the 2008 recession, the value would be approximately \$60,450 (0.3x\$201,500). This is far less than the \$115,932.00 threshold.

Defendants' argument as to market value as of January 6, 2012 amounts to nothing other than hyperbole and wishful thinking concerning the value of the subject property.³ As set forth, the more relevant and comparable data – actual sales of comparable lots since the 2008 recession – was provided by the Fingerhut Plaintiffs. As such, the Court should deny Defendants' Motion to Reconsider.

2. Plaintiff Bloody Point Property Owners' Association properly served Defendants by publication.

Defendants argue that the Court does not have personal jurisdiction in this matter because Plaintiff Bloody Point Property Owners' Association failed to publish the Summons and Complaint in the newspaper "most likely to give notice to the person to be served" as required by S.C. Code Ann. § 15-9-740. Defendants support this argument with several statements concerning the Chester County Sheriff's Office's inability to serve the Complaint at certain times of the day and Defendants' claimed lack of notice regarding this action. The fact remains that, although the Defendants last known address is 120 Marlbrooke Way in Kennett Square, Pennsylvania, they could not be located by the local sheriff despite four separate attempts to complete service. See Return of Service (Exhibit B to Fingerhut Plaintiffs' Motion in Opposition to Motion to Vacate). Based on this, Plaintiff Bloody Point could not have known whether the Plaintiffs actually resided at the Kennett Square address, much less whether they were there at the times of attempted service. Therefore, it was reasonable for Bloody Point to publish the Summons and Complaint in the *Island Packet*, a newspaper of general circulation in Beaufort County – the County in which the property was located and the only area in which it was conclusively known that the Plaintiffs owned property. As the Court originally determined, based upon what was known at the time of service, the *Island Packet* was the newspaper that was most likely to give notice to the Defendants, and therefore service was proper.

³ In fact, the argument Defendants make at page 6 of their motion that no reasonable person would permit the subject property to be lost for the current auction price has already been answered by the Defendants themselves who lost title to this very same property in 2010 for a \$10,000 bid at the Beaufort County Tax Auction for \$1,100 in unpaid taxes.

3. Plaintiff Bloody Point clearly complied with the mailing requirements set forth in S.C. Code Ann. § 15-9-740 and the Order of Publication.

Defendants argue that Plaintiff Bloody Point failed to mail the Summons and Complaint to the Defendants at their last known address, as required under the publication statute and the terms of the Order of Publication. Specifically, Defendants argue that a "review of the Court's file quickly indicates that the Plaintiff did not mail a copy of the Summons and Complaint to the Defendants." This argument is completely baseless. The Fingerhut Plaintiffs attached, as Exhibit D to the Memorandum in Opposition to Motion to Vacate, a copy of the July 21, 2011 letter by which counsel for Plaintiff Bloody Point mailed the Summons and Complaint to the Defendants. The Fingerhut Plaintiffs also attached, as Exhibit P to their Memorandum, an affidavit from counsel for Plaintiff Bloody Point confirming that the letter was mailed.⁴ (prior exhibits attached). The affidavit and July 21, 2011 letter were filed and are part of the court record. Further, they represent incontrovertible evidence that Bloody Point did mail the Summons and Complaint to the Defendants at their last known address. Therefore, the Court should deny Defendants' Motion to Reconsider on this basis.

4. The Fingerhut Plaintiffs are good faith purchasers for value under S.C. Code Ann. § 15-39-870.

Defendants argue that the Court erred in finding that the Fingerhut Plaintiffs are good faith purchasers for value under S.C. Code Ann. § 15-39-870. In order to prove one's status as a good faith purchaser for value, a foreclosure purchaser must demonstrate: (1) actual payment of the purchase price of the property, (2) acquisition of legal title to the property, or the best right to it, and (3) a bona fide purchase, "i.e., in good faith and with integrity of dealing, without notice of a lien or defect." Robinson v. Estate of Harris, 378 S.C. 140, 145, 662 S.E.2d 420, 423 (Ct. App. 2008). The rationale for the good faith purchaser statute is the well established public policy of protecting good faith purchasers and upholding the finality of a judicial sale. Id. As set forth in the Fingerhut Plaintiffs' prior filings, they have met all of the required criteria.

⁴ Defendants contend that the Affidavit of Julie Serafino was introduced over their objection. The undersigned counsel does not recall an objection to the introduction of this affidavit being made. However, the uncontroverted affidavit is clearly relevant to the issue regarding whether Bloody Point mailed the Summons and Complaint to the Defendants. Therefore, the affidavit was properly admitted and considered by the Court.

Defendants mischaracterize David Fingerhut's affidavit in an attempt to prove that Mr. Fingerhut was on notice of the allegedly improper service on the Defendants. See Defendants' Motion to Reconsider at p. 16 (citing David Fingerhut's Affidavit, attached as Exhibit M to the Fingerhut Plaintiffs' Memorandum in Opposition to Motion to Vacate). If one reads the entirety of Mr. Fingerhut's affidavit, it is clear that Mr. Fingerhut was investigating the Defendants' background. See Fingerhut Affidavit at ¶¶ 14-21 (discussing the results of Mr. Fingerhut's investigation, including Mrs. Ashton's status as a licensed real estate agent and the 2010 tax sale on the subject property). Fingerhut never makes a representation concerning his review of the Court's file. The Defendants also argue that the Fingerhut Plaintiffs did not commission a title abstract until after the foreclosure sale. This is irrelevant – the title abstract would not have revealed anything other than what was in the court file at the time of the foreclosure sale.

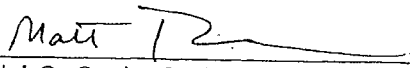
South Carolina Code Ann. §15-39-870 does not require a buyer in a foreclosure sale to second-guess the Court's determination that the parties are properly before the tribunal. Indeed, in Robinson, the Court was faced with a nearly identical fact scenario in which the former property owners alleged that improper service of the Summons and Complaint rendered a foreclosure sale void. The Court of Appeals rejected this argument, noting that the judgment of foreclosure and sale stated that service was properly made, the defendants were in default, all attorneys of record were notified, and the defendants were not in the United States military service. Robinson, 378 S.C. at 146, 662 S.E.2d at 423. In the instant case, there is nothing in the Master's Report and Judgment of Foreclosure and Sale that would have alerted any purchaser to a lien or defect. The judgment clearly provides that service was made on the Defendants, and that the parties were properly before the Court. See Master's Report and Judgment of Foreclosure and Sale (Exhibit H to Fingerhut Plaintiffs' Memorandum in Opposition to Motion to Vacate). Therefore, the Fingerhut Plaintiffs were not on actual or constructive notice of any potential service issues and are good faith purchasers for value under S.C. Code Ann. § 15-39-870.

CONCLUSION

The Defendants have failed to cite any additional law or submit new documentation supporting any of their arguments to vacate the foreclosure sale in this matter. As set forth above, the Court should confirm its previous order and deny Defendants' motion.

-Signature block on next page-

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August 7, 2012
Charleston, South Carolina

*ATTORNEYS FOR DEFENDANTS DAVID L. FINGERHUT
AND PATRICIA M. SANTRY*

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS
)
) CASE NUMBER 2011-CP-07-2176

BLOODY POINT PROPERTY OWNERS
ASSOCIATION, INC.,

PLAINTIFFS,

-VS-

WILLIAM A. ASHTON, JR., and
MICHELLE C. ASHTON,

DEFENDANTS.

COPY

**MOTION TO VACATE/SET ASIDE FORECLOSURE SALE/
VOID MASTER IN EQUITY DEED AND VACATE/SET ASIDE ORDER HEARING**

A Motion to Vacate/Set Aside
Foreclosure Sale/Void Master in Equity Deed and Vacate/Set
Aside Order Hearing was held before the Honorable Marvin H.
Dukes, III, in his Chambers at the Beaufort County Courthouse,
102 Ribaut Road, Beaufort, South Carolina, on Monday, May 14,
2012, commencing at 2:42 P.M.

843-726-4152

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CAROLYN S. KELLY, VCR

843-726-1304

1 problem with the cases being consolidated.

2 ATTORNEY FARRELL: It's
3 basically the same allegations as set forth in the Motion
4 to Set Aside.

5 JUDGE DUKES: Well, that
6 certainly makes sense to do so then. Also without
7 objection, in fact, with consent of the parties, we will
8 consolidate Case 12-CP-07-532 where the cases will be
9 consolidated under the original Case Number of 11-CP-07-
10 2176. All right then. Let's see, the Motion to
11 Intervene is granted so we don't have to deal with that.
12 We consolidated the cases. I am happy to hear the
13 defendant's motion.

14 ATTORNEY FARRELL: May it please
15 the Court, Your Honor, this is the motion by the
16 defendants, William Ashton and Michelle Ashton to set
17 aside a foreclosure sale, Void of Master's Deed and Set
18 Aside Order granting foreclosure based on the fact the
19 court did not have jurisdiction to issue its order. The
20 basis for that is that the defendants assert that their
21 due process is violated, they were not served pursuant to
22 Rule 4. The Plaintiff failed to comply with South
23 Carolina Code of Laws Section 15-9-710 and 740 and as
24 such because their due process rights were violated they
25 are entitled to have the Order set aside; case laws

1 indicated to comply with the - - well, actually, let me
2 give you a little background. The foreclosure was - - he
3 entered a judgment on 12/6, a Default Judgment against
4 the Ashtons. The Plaintiff appeared to have a Sheriff in
5 Chester County Pennsylvania where the defendants reside
6 serve the defendants. The Sheriff went out there four
7 different occasions, three of the four were in the
8 morning during the business week, one of those was around
9 7:00 in the evening and the defendants were not present
10 at the time. And their Affidavit states that they were
11 working and the Affidavits have been filed with the
12 court. They were working at the time and they stated
13 that the Sheriff did not leave a card, so they were not
14 aware of these proceedings going on. Because the Sheriff
15 could not serve the defendants, the Plaintiff went ahead
16 and published - - pursuant to the publication statute,
17 they published it in a newspaper, or actually in the
18 Island Packet. And right now what the defendants would
19 assert is that the Plaintiff did not file or publish the
20 Notice of the Summons and Complaint in a newspaper most
21 likely to give them notice. Another requirement of the
22 publication statute is that the Plaintiff is required to
23 mail a copy of the Summons and Complaint to their
24 residence which we, the defendants, assert that the
25 Plaintiff did not do. There is also another standard to

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1 set aside a judicial foreclosure sale. Those two prongs
2 would be that the sales prices is so gross as to shock
3 the conscious or the sales accompanied by other
4 circumstances warranting interference. And the Ashtons
5 would assert that they can meet both of these prongs. It
6 appears in 2006 or 2005, the Ashtons purchased a
7 property, the cash sale for \$201,000.00. The property
8 was purchased by Mr. Fingerhut and Mrs. Santry for
9 \$8,800.00. The standard that the courts have generally
10 looked at, there is no bright line rule, but anything
11 less than 10% of the actual price of the property is a
12 price that is so gross as to shock the conscious. And if
13 you look at those percentages, \$8,800.00 of \$201,500.00
14 is 4.18%. They would also cert that the other
15 circumstances warranting interference is the failure for
16 them to be served and the failure of the Plaintiff to
17 comply with the publication statute. Now, the
18 foreclosure Bidders, they did submit a brief this past
19 week and in that brief it contained a letter from the
20 attorney, Julie Serafino, and an Affidavit from her where
21 it states that she said that she did mail a copy of the
22 Summons and Complaint. I just want to bring attention to
23 the court that virtually every other pleading in that
24 file had a Certificate of Mailing. The Summons and
25 Complaint did not have a Certificate of Mailing. And

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1 Rule 4 states that your Affidavit of Mailing shall be
2 filed with the court, and although it does state that it
3 will not make service ineffective if the Affidavit is not
4 filed, it does go on to state that once it is filed, it
5 becomes part of the record. So, I would object to that
6 letter or any Affidavit stating that she mailed it be
7 admitted at this time. This should have been admitted in
8 the original action because it's not a part of the
9 record. So, based on the sales price and the failure for
10 the Plaintiff to mail a copy of the Summons and Complaint
11 to the defendants and third prong or the second prong to
12 set aside a foreclosure sale is that the Summons and
13 Complaint should be published in a newspaper most likely
14 to give notice to the defendants. Well, if you look at
15 all of the Certificates of Service in the file, all of
16 them are directed to the defendants' residence in Chester
17 County Pennsylvania. They have lived there for 13 years
18 as set forth in their Affidavit. The Plaintiff went
19 ahead and published the Summons and Complaint in the
20 Island Packet; a more suitable place or the newspaper
21 most likely to get the notice would have been a newspaper
22 in Chester County Pennsylvania. There is case law to
23 support that which is in the defendants' brief in support
24 of its motion. There is also another issue as to the
25 Foreclosure Bidders duty, the case law also supports he

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1 has a duty to make sure that the court has jurisdiction.
2 He has been, as it said in his Affidavit, he's an
3 attorney of 25 years dealing in real estate, had he
4 looked in the file, he would have seen - - the court's
5 file, he would have seen that there is no Certificate of
6 Service for the Summons and Complaint as required by the
7 statute; he would have seen that the Summons and
8 Complaint were not published in a newspaper most likely
9 to give notice to the defendants. So, I believe he has
10 also failed that duty, which is the only duty upon a
11 successful Foreclosure Bidder. There's also the
12 Foreclosure Bidders have brought up some issues about the
13 defendants failure to pay their assessments. I don't
14 believe those are relevant to the issue of publication
15 and service on the defendants and the jurisdiction of the
16 court, but Bloody Point did follow Daufuskie Island
17 Properties of which Bloody Point is a part of filed for
18 bankruptcy in 2009, which the defendants received notice
19 of that. And in 2011, the property was sold by the
20 trustee to another individual, Brian J. McCarthy. So, the
21 POA, to say the least, has been in and out of operation
22 for some time so it's reasonable to expect that my
23 client, the Ashtons, were not totally aware of what
24 assessments were due. Even so, that's irrelevant, the
25 court doesn't have jurisdiction, then the judgment can't

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1 be issued so they're not bound by that judgment.

2 JUDGE DUKES: Anything else?

3 ATTORNEY FARRELL: Another issue
4 is the value of the property. The defendants have - -
5 the value the defendants have based it on is basically
6 that they paid cash, 201,000. There is a case 'Wells
7 Fargo v. Turner' where the court determined the value by
8 looking at the note and mortgage. Now, of course, there
9 was no note and mortgage in this case, but that is some
10 indication that they were looking at the point of sale
11 and what the defendants had purchased it for. We're also
12 looking - - we had a third party appraisal done, she
13 appraised it at 140,000. We also would like the court to
14 consider the Assessor's office which is even at
15 \$140,000.00, as well. The Foreclosure Bidders' attorney
16 can speak to this, but their appraisal gave it an
17 appraisal value of \$17,000.00. I believe, if I'm correct,
18 I wanted to also look at a tax sale that happened in 2010
19 which I want to bring to the court's attention, that the
20 Ashtons did redeem their property after the tax sale had
21 taken place. After review of the appraisals, the
22 appraisal prepared on behalf of the Ashtons have
23 properties that are closer and are actually located in
24 Bloody Point, whereas the appraisals for the Fingerhuts
25 and Ms. Santry, they are not in Bloody Point at all. So I

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1 think our appraisal is a more accurate representation of
2 the value of the property.

3 JUDGE DUKES: And what does your
4 appraisal say?

5 ATTORNEY FARRELL: 140,000.

6 JUDGE DUKES: I thought you said
7 that was the tax appraisal.

8 ATTORNEY FARRELL: That is, as
9 well. That's the tax appraisal, our appraisal, and then
10 the purchase price of 201,500.

11 JUDGE DUKES: What's the date of
12 the appraisal that you got, not the tax appraisal, the
13 purchase price?

14 ATTORNEY FARRELL: Oh, that was
15 April of 2012.

16 JUDGE DUKES: All right.
17 Anything else?

18 ATTORNEY FARRELL: That's it,
19 Your Honor.

20 JUDGE DUKES: Before you begin,
21 let's go off the record.

22 (OFF THE RECORD)

23 (ON THE RECORD)

24 JUDGE DUKES: Anything else?

25 ATTORNEY FARRELL: That's it for

1 now, Your Honor.

2 JUDGE DUKES: Who would like to
3 go first?

4 ATTORNEY TILLMAN: Your Honor,
5 Matt Tillman for Foreclosure Bidders, David Fingerhut and
6 Patricia Santry. First of all, to address the argument
7 that the bid price or sales price was so low as to shock
8 the conscious of the court, we submitted a case to you
9 'Eastern Savings Bank v. Sanders' which I think we're in
10 agreement that 10% is generally the threshold that the
11 court looks at to determine whether it shocks the
12 conscious or not. We've also submitted a bankruptcy
13 court case from New York but interpret in South Carolina
14 law that makes a lot of sense in that; first, the fact
15 the price they paid and the price you look at when
16 determining what the purchase price is not only the
17 foreclosure bid that includes any assessments or
18 mortgages you're assuming and so forth to capture all of
19 the value that you're spending to get to that number.
20 And if you look in this case, my clients paid the
21 \$8,000.00 bid price plus they paid another \$3,593.20 in
22 assessments and back taxes on the property for a total of
23 \$11,593.20. Ultimately, I don't think that matters, but
24 if you look at the Closing Statement we attached as
25 Exhibit K to our Memorandum, those numbers are in there.

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1 I want to point out that the Ashtons are relying on two
2 pieces of evidence to support their value claim, one is
3 the fact that they paid \$201,500.00; I think John
4 accidentally misspoke, that was in 2001 according to their
5 Affidavit, not 2005. And as you know, we've gone through
6 a major upheaval since that time; prices have declined
7 significantly. I think prices have declined moreso on
8 Daufuskie because of the issues with the golf course and
9 the HOA's and so forth over there. And you will see that
10 in my client's appraisal. Also, if you look at the
11 appraisal that they submitted by Accent Appraisals, I want
12 to first point out that this is essentially a self
13 serving appraisal. On Page 6 of that, if you look at Page
14 6 of that appraisal, you will see that the appraiser - -
15 and I can't remember if it's male or female, I apologize
16 - - but that appraiser notes that the intended use is to
17 rebut the January 6, 2012 sale and sales price of the
18 subject property at \$8,800.00. So, from the very
19 beginning, the appraiser, at least, has been informed
20 that we have a reason for this and that reason is to
21 rebut that price. If you look at the comps used in that
22 appraisal - - and the reason I'm getting into specifics
23 on this appraisal is I want you to compare the one
24 they've done and the one that my client's appraiser did.
25 If you look at the comps on Page 2, these are actual

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1 sales comps, but they're oceanfront lots, and this is an
2 interior lot, the foreclosed property is. And so, you've
3 obviously got probably a vast difference in value there.
4 And then if you look at the remaining comps which are on
5 Page 2 - - excuse me, Pages 3 and 4, these are all MLS
6 Listings. These aren't sales. These are someone's hope
7 that they will sell it for this price. And if one goes
8 to the MLS, they will find that most of these have been
9 on the market for a year or more. And so - -

10 ATTORNEY FINGER: If you would, if
11 you would just look at the date of all those comps
12 because none of them are relevant timelines, they are all
13 pre-bust.

14 ATTORNEY TILLMAN: Right.

15 ATTORNEY FINGER: 1, 2, 3.

16 ATTORNEY FARRELL: No. The 1, 2, and
17 3 are 2011, all of them are 2011.

18 ATTORNEY FINGER: I got '08.

19 ATTORNEY TILLMAN: But in any event,
20 Your Honor, there are indicia of an unreliable appraisal
21 here. And with that, I have turned up the appraisal that
22 Mr. Fingerhut commissioned. First of all, I want to
23 point out and that is going to be Exhibit N to our
24 Memorandum in opposition. Mr. Fingerhut commissioned
25 this appraisal for the purpose of establishing a value

1 for buying title insurance. This was not to support the
2 \$8,800.00 number. This was done, I believe, before the
3 Motion to Vacate was filed before he had notice that
4 there would be a challenge to it. And then if you look
5 at Exhibit O it backs up not only the language in his
6 Affidavit affirming that, you have an email from Mr.
7 Fingerhut and Mrs. Santry to Julie Serafino expressing
8 disappointment that the appraisal that they commissioned
9 came back at \$17,000.00 They thought that it would, for
10 title insurance purposes, it would be more than that.
11 And so, that is just indicia that this was not an
12 appraisal that was commissioned for the very purpose of
13 supporting the number. And if you look through the
14 appraisal you will see that there is no language in there
15 as you find in the defendant's appraisal about the
16 purpose being to support the price or to counter the
17 price of \$8,800.00. There are a couple of other indicia
18 of value that I think are important. Number one being if
19 you look at the Affidavit of David Fingerhut, he bids on
20 these properties from time to time, and he said there
21 were 50 bidders at this auction. And so, with 50 bidders
22 there, admittedly there are only two people bidding on
23 this particular property, but if it were worth a great
24 deal of more money, one would think that there would be a
25 higher bid if it was worth more than \$8,800.00. The

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1 other being the fact that there was a tax sale
2 approximately two years before this foreclosure sale that
3 David alluded to in which the property sold for
4 \$10,000.00. And if you look, we've attached a case that
5 supports the use of a tax sale as indicia of the value of
6 the property. And so, I would pose to the court that
7 you've got competing appraisals here, one for the purpose
8 of really just countering the 88 - - for the specific
9 purpose of countering the \$8,800.00 purchase price,
10 you've got one for a purpose totally unrelated to
11 supporting the number or countering the number at which
12 the property was purchased, and you've got one appraisal
13 that uses oceanfront lots as sales comps, MLS Listings as
14 interior comps. And you've got another that uses actual
15 sales at, I believe it was 15,000, 20,000 and 17,500,
16 those were actual sales on interior lots. So, if you
17 look at roughly \$11,500.00 that my clients paid for the
18 property after you include the assessments and back taxes
19 and so forth, whether you compare that to the \$10,000.00
20 tax sale, \$17,000.00 appraisal, that comes well within
21 the 10% purchase price now established in the Eastern
22 Savings Bank case. And then going on to the issue about
23 service - -

24 ATTORNEY FARRELL: Your Honor,
25 is it all right if I address the issues Mr. Tillman

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1 brought up?

2 JUDGE DUKES: Yeah. We just
3 going to take it a section at a time?

4 ATTORNEY TILLMAN: That's
5 correct.

6 ATTORNEY FARRELL: Regarding the
7 Closing Statement that the foreclosure bid was \$8,800.00,
8 if you will look at the Closing Statement, their
9 settlement charges are \$917.00. That is for \$175.00 for
10 title abstract; \$600.00 for additional attorneys fees;
11 title insurance of \$100.00; recording fees which it says
12 "to record the mortgage," and it should have been
13 included in the \$8,800.00 or the judgement that the POA
14 got against the Ashtons; and then POA fees were 2,012
15 which were paid ahead of time, not in arrears. As far as
16 the appraisal and the arguments Mr. Tillman raised, this
17 is not necessarily an interior lot, it's second row
18 ocean. And if you look at the picture provided in Accent
19 Appraisals the location of the property is right across
20 the street from the beach as opposed to the comps that
21 Mr. Fingerhut's appraiser provided. All you need to do
22 really is just to compare the two different maps of where
23 the properties are located. And these are comps that
24 were in - - yes, they are beachfront properties, but you
25 know, they are properties that are right across the

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1 street from the subject property. So, you're looking at
2 a 300 and something thousand dollar say comp one, let's
3 say comp 3 here is .78 acres for 315,000 sold in November
4 of 2011. I just find it hard to believe that \$315,000.00
5 across the street or in the general vicinity, the
6 property right across the street is going to be
7 \$17,000.00.

8 JUDGE DUKES: Anything else on
9 that issue?

10 ATTORNEY FARRELL: No, sir.

11 JUDGE DUKES: All right.

12 ATTORNEY TILLMAN: And, Your
13 Honor, I would just point out again the appraisal that my
14 client had done had no - - there were no instructions to
15 him that this \$8,800.00 had any bearing on the appraisal.
16 It was done to get title insurance and so, there was no
17 reason for the appraiser to choose lots that were somehow
18 dissimilar or of less value than one would expect or less
19 value than the lot that was actually purchased. He was
20 just doing it for the purpose of getting title insurance,
21 and at the end of the day, my client wanted to insure it
22 for as much as possible. And so, inherently, the
23 appraisal my clients had done was more reliable than the
24 one that the Ashtons had done. Will you bear with me for
25 just one moment, Your Honor?

1 on an Order of Publication to the defendants, and there
2 was no notice of irregularities in the foreclosure
3 process of Mr. Fingerhut's Affidavit which is attached as
4 Exhibit N to our Memorandum, he wasn't aware of any
5 defects in the process and there is an Order of Default
6 in the foreclosure file. There was just nothing to put
7 him on notice that there were any improprieties
8 whatsoever. He bought faith as a good faith purchaser and
9 he affirms that he had no notice constructive or
10 otherwise of any defect, therefore, as in the Robinson
11 case we cited we ask that the court find that
12 Mr. Fingerhut and Mrs. Santry were good faith purchasers
13 providing under the statute and deny their motion to void
14 the judicial sale.

15 JUDGE DUKES: Anything else?

16 ATTORNEY TILLMAN: Not on that
17 that point.

18 ATTORNEY FARRELL: I would just
19 reiterate that Mr. Fingerhut and Mrs. Santry are not good
20 faith purchasers. Our case did have irregularities and
21 that the court didn't have jurisdiction. Mr. Fingerhut's
22 Affidavit does not say he reviewed the court's file, it
23 merely says that he reviewed the notice of sale; had he
24 reviewed the court's file, he would have seen that there
25 was no Certificate of Filing or Certificate of Mailing

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1 for the Summons and Complaint and he would have seen that
2 the Summons and Complaint were published in a newspaper
3 in Beaufort County, not Pennsylvania. Again, he is an
4 attorney of 25 years, he should have easily been able to
5 tell that the publication statute was violated. That's
6 all right now.

7 ATTORNEY TILLMAN: On that
8 point, Your Honor, I'm not sure that the law requires
9 that level of inspection if you look at the Robinson case
10 that I've cited. They note that the judgment itself
11 stated that service was made upon the defendants, both of
12 the defendants were at default; the attorneys of record
13 were notified of the hearing and that neither of those
14 defendants were in the United States military service.
15 So, I do not believe that the statute requires that level
16 of inquiry, only that the buyer is a good faith purchaser
17 based on the record before him. It also notes that in
18 that case Mr. Duggan showed that he made an actual
19 payment on the purchase price, which my clients had
20 acquired legal title to the property or the best right to
21 it which they did. They got a Master's Deed. And that
22 they made a bona fide purchase in good faith with
23 integrity of dealing without notice of a lien or defect.
24 As in this case, you know, the court record was very
25 similar if not exact identical to the one in Robinson

1 showing the parties were in default, the court had
2 jurisdiction.

3 ATTORNEY FARRELL: I would just
4 take a little part of 'Cumbee vs. Newberry' which is
5 cited by the Foreclosure Bidders' attorney. There is
6 quote, "Required at his peril only to make inquiry as to
7 the jurisdiction of the court which ordered the sale and
8 whether all proper parties were before the court when the
9 order was made," end quote. It does have a duty to make
10 sure the court had jurisdiction which it did in this
11 case. We could also look at 'Bennett v. Floyd' which
12 states, quote, "The purchaser in good faith that a
13 judicial sale is bound only to see that the court had
14 jurisdiction of the subject of the action and the
15 parties in interest." Mr. Fingerhut and Mrs. Santry did
16 have a duty to make sure the court had jurisdiction and
17 again, being an attorney, he could have easily determined
18 that.

19 ATTORNEY TILLMAN: And, Your
20 Honor, I will just point out that the Order of Sale
21 pointed out that the court had jurisdiction. There was
22 an Order of Publication that was followed as set forth in
23 the Affidavit of Julie Serafino. Anyway, I'll just leave
24 it at that. I won't beat the dead horse.

25 JUDGE DUKES: Anything else from

1 any party?

2 ATTORNEY TILLMAN: On that,
3 Terry?

4 ATTORNEY FINGER: On that, no.

5 ATTORNEY TILLMAN: I've got just
6 two other arguments, Your Honor.

7 JUDGE DUKES: All right. Go
8 ahead.

9 ATTORNEY TILLMAN: And this is
10 just real quickly. There is an argument that Bloody
11 Point failed to comply with the Order of Publication by
12 failing to serve the defendants at their address. I will
13 point out the Affidavit of Julie Serafino says - -
14 asserts that I mailed it, so we've got that as an Exhibit
15 to our Memorandum, that's Exhibit O. I'm sorry, Exhibit
16 P. I will also point out to the court that we have a
17 situation where you have four attempts of personal
18 service on the defendants, three in the morning, one at
19 night on both of them. We got an Affidavit from that
20 Sheriff saying they couldn't find them. You have two
21 publications in the local newspaper that one of the
22 Summons and Complaint and one of the Notice of Sale, and
23 you have at least four letters to the last known address
24 of the Ashtons. And there is no disputing that the
25 address that is in the foreclosure file, the Certificates

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1 of Mailing and so forth go to the address that the
2 Ahstons admit as their address in their Affidavits to
3 this motion. Ans so, you have at least four letters
4 going to them with various pleadings from this
5 foreclosure sale. And so, we would also submit to the
6 court that they are barred by the doctrine of laches. I
7 mean, they got notice by mail or either didn't open their
8 mail. That being the case, they had a duty to intervene
9 into the foreclosure sale or show up and bid, one or the
10 other, didn't do it until after the court had already
11 issued a foreclosure deed -- excuse me, a Master's Deed,
12 and I believe one of the elements of laches is that there
13 be some prejudice to the other parties. Well, there's
14 not only prejudice to Bloody Point for having paid an
15 attorney to go through this entire process, there is also
16 prejudice to the system itself in the resources that were
17 expended to make this foreclosure sale happen. And my
18 client has also paid, not only the \$8,800.00, they paid
19 for the assessments and so forth; they went out and hired
20 an appraiser, they paid that; they bought title insurance
21 and such, so they have been prejudiced as well by paying
22 money that they won't get back if this foreclosure sale
23 is overturned.

24 JUDGE DUKES: Anything else?

25 ATTORNEY FARRELL: I just again

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1 object to the letter and Affidavit being admitted. It
2 wasn't admitted in the original foreclosure action and
3 there's no Certificate of Mailing filed with the court
4 pursuant to Rule 4. Now, Rule 4 says once it's filed, it
5 becomes a part of the record and none of that was filed
6 prior to this hearing.

7 JUDGE DUKES: You're talking
8 about, and I'm sure it's in here somewhere, but the
9 Affidavit of Julie Serafino with regard to the mailing of
10 the Summons and Complaint after the foreclosure.

11 ATTORNEY FARRELL: Yes.

12 JUDGE DUKES: Okay.

13 ATTORNEY FINGER: The letter is
14 a part of the attachment package.

15 JUDGE DUKES: Part of the
16 package? Okay. And let me make sure that y'all have
17 actually filed all of this with the Clerk, is that right?
18 This is simply a copy that I have in front of me. Okay.
19 I will allow it for what it's worth as a part of this.
20 What else?

21 ATTORNEY FARRELL: I cited a
22 case Trio Engineering, again, it lists extensive case law
23 with failure to mail a copy of the Summons and Complaint.
24 The statute must be strictly construed. 'Brown v. Malloy'
25 case that I cited quote, "Super imposed upon the

1 requirements of the Order of Publication is the mandate
2 of Section 15-9-740 which required publication in a
3 newspaper most likely to give notice to the person to be
4 served." The Plaintiff here never received notice from
5 the Post Office or a returned letter saying that the
6 letter was undeliverable. There is no dispute that they
7 resided in Chester County Pennsylvania, that a newspaper
8 up there would have been more appropriate to give notice.
9 There is also a case 'Sink v. Easter' which was cited in
10 Trio and it says, quote, "The mere fact that the
11 defendant has actual notice of the institution of the
12 proceedings against him is not sufficient to give the
13 court jurisdiction where the plaintiff has not complied
14 substantially with the statutes on constructive service."
15 We deny they had notice, and even if they did as alleged
16 by Mr. Tillman, notice doesn't equal jurisdiction. And
17 our position is that a Summons and Complaint weren't
18 mailed and even if it was mailed, they failed to comply
19 with the publication statute and didn't publish it in a
20 newspaper in Chester County Pennsylvania.

21 JUDGE DUKES: Okay. Anything?

22 ATTORNEY FINGER: If I could get
23 my two cents in when the appropriate time comes.

24 JUDGE DUKES: If there anything
25 else and then yeah.

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1 submitted clearly show jurisdiction, an appropriate sale
2 that's been confirmed and I would ask that you would
3 dismiss the motions and have your Order tailored so it
4 covers not only the Bloody Point case but also the case
5 against Mrs. Santry and Mr. Fingerhut. Thank you, Judge.

6 JUDGE DUKES: Anything else?

7 ATTORNEY FARRELL: Just in
8 closing, I mean, you need to remember the judicial
9 foreclosure sale, the standard is it should be set aside
10 if the sales price is so gross as to shock the conscious
11 or the sale of this company by other circumstances
12 warranting interference. Again, we're saying lack of
13 jurisdiction, the publication statute, case law says it
14 should be strictly complied; they have not addressed it
15 being published in the Island Packet. It should have
16 been published in Chester County Pennsylvania as 'Brown
17 v. Malloy' said, in that case the notice was published in
18 an adjacent County and the court sent it back for a
19 determination of whether or not this was adequate or not.
20 Pennsylvania and Beaufort County are 600 miles apart from
21 each other, it's no question that it was not published in
22 a place most likely to give the defendants notice. And
23 really, I mean, it's just ludicrous to think for
24 \$2,700.00 assessments, that the Ashtons are going to pay
25 201,000 and let it go for \$2,700.00. And, you know, the

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1 Plaintiff could have hired a private process server,
2 they're not required to, but, you know, Sheriffs usually
3 going during business hours. All of these attempts were
4 during the work week in the morning, one was in the
5 evening at 7:00, but people work, people don't always get
6 home these days around 7:00, so essentially there was one
7 time outside of a business work day that the Sheriff
8 tried to serve and we do hire private process servers in
9 our firm to go and serve them after hours if we're not
10 successful, and they failed to do this. They went
11 straight to the publication statute and didn't even meet
12 the prongs to satisfy the requirements that the statute
13 should be strictly construed, and they did not strictly
14 comply with that statute.

15 JUDGE DUKES: All right.

16 Anything else?

17 ATTORNEY FINGER: Other than the
18 fact that our file contains efforts to serve Mr. and
19 Mrs. Ashton by Certified Mail January of '11 and back in
20 December of '10, first with the liens and then with other
21 stuff and it was just first notice, second notice and it
22 was returned. So, efforts were made all along to try to
23 let these folks know that something was happening with
24 their property here. They have an obligation as property
25 owners here in Beaufort County to pay their taxes,

1 apparently they got to a tax sale at one point in time,
2 they have an obligation to pay their assessments. And I
3 don't think that the court - - the court does not require
4 on a mortgage foreclosure or a regime foreclosure to
5 search a newspaper out in eastern buck two when we're
6 trying to get in rem jurisdiction over them here in our
7 county. And clearly the publication statute addresses
8 it right up front, when the defendant is not a resident
9 of this state but has property therein, the court has
10 jurisdiction over the subject of that action. You being
11 Beaufort County Master-In-Equity, you have jurisdiction
12 of all foreclosure actions, and I think the foreclosure
13 statue itself speaks directly to this issue.

14 ATTORNEY FARRELL: I know that
15 South Carolina Code of Law 15-9-720 that states you can
16 publish where the property is located if the parties are
17 unknown; they knew who the parties were, they knew where
18 they resided for 13 years and they didn't search out a
19 publication there. The publication statute is clear, it
20 says "The place most likely to give them notice." There
21 is case law that supports it, they don't have to publish
22 it in South Carolina, they need to find the most likely
23 place to give them notice which was Pennsylvania. You
24 know, they can't rely on one hand that the letter stating
25 that Julie Serafino mailed the Summons and Complaint to

1 their address rely on that to satisfy one prong and then
2 say, "Oh, we don't have to hunt them down and go up to
3 Pennsylvania and publish," on the other hand, I mean,
4 that's what they're basically trying to do.

5 JUDGE DUKES: Well, the
6 difficult question is the Clerk signed the Order of
7 Publication as I just noticed looking through there and
8 the issue for the Plaintiff here is they've tried in
9 Pennsylvania unsuccessfully, maybe they will try
10 somewhere else. So, for whatever reasons there were for
11 the Clerk to sign an Order of Publication, I notice the
12 Order of Default, as well.

13 ATTORNEY FARRELL: Can I say one
14 thing to do?

15 JUDGE DUKES: Sure. Go ahead.
16 There is a case I cited in 'Brown v. Malloy' yes that the
17 Clerk issued it but the court does have the ability to
18 look into it; have a hearing on whether or not notice was
19 adequate and basically compliance with the publication
20 statute, so even though the Order was issued, the court
21 doesn't have the ability to look at whether the Order was
22 issued properly, but it does have the ability to look at
23 whether or not notice was adequate which we assert was
24 not.

25 ATTORNEY FINGER: There is

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1 nothing in the record before the court where Mr. and
2 Mrs. Ashton have indicted there's any newspaper of
3 general circulation where they live.

4 ATTORNEY FARRELL: Actually
5 there are Affidavits that state the newspaper.

6 ATTORNEY FINGER: Does it give a
7 name of the newspaper?

8 ATTORNEY FARRELL: Yes, it does.

9 ATTORNEY FINGER: Oh, I'm sorry.
10 I apologize.

11 ATTORNEY TILLMAN: Your Honor, I
12 would just like to point out again, I would like for you
13 - - if this is a tough one for you I would like for you
14 to review that Robinson case that I cited. I do not
15 believe that under the good faith purchasers of value
16 statute, my clients were required to perform the level of
17 inquiry that the defendants are suggesting that they had
18 to. The file showed an Order of Publication, compliance
19 with it, an Order of Default, that's what they saw; for
20 all they knew there was jurisdiction, they are good faith
21 purchasers for value without notice.

22 JUDGE DUKES: Well, they do have
23 a little bit more or little bit higher requirement though
24 to look into the jurisdiction. The only thing I'm going
25 to sort of look behind the documents and if, in fact, on

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT) IN THE COURT OF COMMON PLEAS

BLOODY POINT PROPERTY OWNERS)
ASSOCIATION, INC.,)

Plaintiff,)

-versus-)

WILLIAM A. ASHTON, JR., and)
MICHELE C. ASHTON,)

Defendants.)

Civil Action Number
2011-CP-07-2176

COPY

MOTION TO RECONSIDER held before the
Honorable Marvin H. Dukes III, Master in Equity,
on the 16th day of October 2012, at the Beaufort
County Courthouse, 102 Ribaut Road, Beaufort,
South Carolina, commencing at approximately 1:40
p.m.

Bettye Anderson & Associates

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1 THE COURT: We're here for Bloody Point Property
2 Owners Association, et al, versus Ashton, et al. This is
3 Case 11-CP-07-2176. We are here on a Motion to Reconsider.
4 Happy to hear from y'all.

5 MR. BERL: Thank you, Your Honor. If it please
6 the Court, may I remain seated, 'cause I have all these
7 documents here in front of me?

8 THE COURT: Absolutely.

9 MR. BERL: Thank you, sir. Your Honor, this is a
10 case that came before the Court pursuant to a motion to set
11 aside a default judgment and vacate a sale that came about
12 after that default judgment. The Court heard testimony,
13 and I was not here at that original case. My associate
14 John Ferrell heard it.

15 I've talked to Mr. Tillman here, opposing
16 counsel, and he's indicated that a lot of documents did go
17 into the record already. I just ask the Court that any
18 documents that are attached to the original motion, that
19 are attached to Mr. Tillman's response, attached to our
20 motion for reconsideration, the supplemental affidavit that
21 went with the appraisal, basically any and all documents
22 that have been attached to any of the papers presented to
23 the Court be admitted into evidence as relevant to the
24 matters before the Court today.

25 MR. TILLMAN: No objection, Your Honor.

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1 THE COURT: All right.

2 MR. BERL: Your Honor, there are a couple areas
3 that give rise to this. The first one deals with whether
4 this court even had jurisdiction to handle the case.
5 Specifically, this case, service was accomplished by an
6 order of publication.

7 Now, from the record it's apparent, Your Honor,
8 that there was an affidavit submitted by Julie Serafino --
9 which I have a copy of here and can pass up to the Court if
10 it's not already in the record -- in which she states,
11 basically, that a cover sheet and all the different things,
12 the lis pendens, summons and complaint, etcetera, was filed
13 against the Ashtons to foreclose a lien on the real
14 property, as described more fully in the complaint. And
15 then she says, "A diligent search to perfect service upon
16 Defendants William A. Ashton, Jr., and Michele C. Ashton
17 proved unsuccessful, as is shown by the affidavits of non
18 service filed herein. The said defendants' present
19 whereabouts are unknown, and said defendants could not be
20 found within this state."

21 Now, the documents that were submitted, Your
22 Honor -- which I believe have been already handed up to the
23 Court, but in the event that they're not, I'm going to pass
24 them up at this time -- there's two affidavits of service,
25 is what they're called. One for my client William A.

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1 Ashton, Jr., and one for my client Michele C. Ashton, which
2 indicates that a deputy sheriff, ostensibly a Kurt Hanson,
3 went to the individual's homes on four occasions. He lists
4 four attempts, all of which occurred during the work week,
5 all of which occurred during the business day, during which
6 time both of my clients work. And he went back one time at
7 7:08 p.m. and there was nobody at the residence.

8 However, on one of his attempts, the very first
9 one, he did note on this affidavit of service that the
10 garage door was open and there was a vehicle in the
11 driveway, but he could not find anybody at the residence.

12 Now, whether somebody was there showering,
13 whether someone was out walking the dog, whether someone
14 was jogging, at a neighbor's house, it's uncertain. But
15 the bottom line is he didn't find anybody.

16 He did not indicate that he did anything to let
17 someone know that he had been there, such as leaving a card
18 on the windshield of that car or in the driver's side, you
19 know, door window right there where someone would see it.
20 In fact, his affidavit, if it could be called an affidavit,
21 doesn't mention anything about anything other than the four
22 attempts, the fact that there was a garage door open and a
23 vehicle in the driveway.

24 Now, that affidavit of service, Your Honor -- if
25 you don't have it in front of you, I want you to take a

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1 look at this -- you will note this is a form provided --
2 that was sent to someone for this, and the form is not
3 filled out in any way correctly. If you look at the top,
4 it says, "Personally appeared before me, blank, the
5 undersigned deponent." Well, nobody's name is put in
6 there. Okay?

7 And down below, where there's a blank to put the
8 deponent's signature, there's no signature. What you've
9 got is some scribbled notes down below with a signature
10 below that, but there's nothing that would indicate to a
11 court that that's the person who was making affidavit to
12 the notary.

13 Moreover, sir, this matter was submitted to the
14 clerk of court for an order of publication. Now, I would
15 submit to the Court that at no time in the 25 years that
16 I've been practicing in this jurisdiction has Your Honor or
17 any of your predecessors ever issued an order of
18 publication based solely upon an effort by an out-of-town
19 sheriff to find someone, especially one that says they went
20 during the business day every time.

21 As a minimum, this court has always required that
22 an effort to serve by mail has been sent and either refused
23 or not claimed; or that a private process server has gone
24 out and gone at hours that would likely find business
25 people at the home and no one has been able to be located;

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1 or that a skip trace has been found to show that the
2 persons are no longer at that address or are nowhere to be
3 known.

4 Instead, in this case, what happened was,
5 basically, our clerk of court basically did nothing more
6 than rubber stamp a document that had been placed before
7 her. Because you will see in the order for publication --
8 which I'm going to hand up next, Your Honor -- that the
9 order for publication says, "The whereabouts of Defendant
10 William A. Ashton and Michele C. Ashton are unknown, and
11 that said defendants are necessary parties to the within
12 action."

13 Now, this is an order that's submitted by Julie
14 Serafino, and she's with Mr. Finger's law firm. And it
15 says in this order -- it goes on to say that, "The summons
16 herein, together with a notice of filing thereof in the
17 clerk of the Beaufort County Court, be served upon
18 defendants by publication of same in the Island Packet, a
19 newspaper published in Beaufort County, state aforesaid,
20 which newspaper is designated most likely to give notice to
21 said defendants."

22 Now, if you look at Ms. Serafino's affidavit, her
23 affidavit says, "Defendants cannot be found within the
24 State of South Carolina."

25 Moreover, clearly from the notes of the deputy

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1 there, there clearly was someone living at that address.
2 There were no efforts made to service them by publication
3 -- or excuse me, by registered mail or a private process
4 server before this matter went forward.

5 And I would submit to the Court that in the
6 absence of anything in that affidavit by Ms. Serafino which
7 gives evidentiary support to the fact that the newspaper
8 here in Beaufort County is the best way to notify these
9 people, this order of publication is materially defective.
10 And I would say that because the parties knew -- Mr.
11 Finger's firm knew that this person owned a piece of
12 undeveloped land on Daufuskie Island, there was nothing in
13 anything they had that would indicate that my clients were
14 in any way going to be in Beaufort County, South Carolina,
15 where they would see a notice of publication in this paper.

16 As a minimum, it should have been published in
17 the county in which they reside, in which they had all of
18 their documents showing that they resided there.

19 And, in fact, one thing that's kind of
20 interesting is that there was a tax sale before this action
21 was commenced and the property was sold at the tax sale,
22 and then subsequently redeemed by my clients up there in
23 Pennsylvania. So anyone doing a title search prior to the
24 implementation of this action would have seen that and
25 would have known these people were still at that address,

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1 and that's where they could be served at. But instead,
2 without anything in her affidavit, she submits this order
3 for publication which says that the newspaper is designated
4 most likely to give notice to the defendants. Not a chance
5 in the world that that could happen, Your Honor.

6 But, again, this was a matter of a rubber stamp
7 instead of someone doing their job like you always have
8 done, by requiring additional efforts before we go to order
9 of publication, which is a last resort.

10 Secondly, after that service took place,
11 ostensibly by publication, that order, as you see, requires
12 that Ms. Serafino not only publish it three times in the
13 Beaufort -- in the Island Packet, but that she also send it
14 by mail to the parties in compliance with the statute,
15 which must be strictly adhered to.

16 The problem is, when she came to this court for
17 her affidavit of default, the clerk, again, rubber stamped
18 her affidavit and order without looking at what the
19 affidavit said because the affidavit says that, "At my
20 direction, the summons and complaint and lis pendens in
21 this matter were served upon the defendants by publication
22 in the Island Packet, once per week for three consecutive
23 weeks," and it says the dates.

24 Nowhere does it say that the summons and
25 complaint were mailed to the defendants, as was required by

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1 the order and the statute.

2 Instead of grabbing onto that material defect in
3 the affidavit, the clerk rubber stamped it and issued an
4 order that had been provided to her by Ms. Serafino, in
5 which she said that she had basically done just as I said
6 before with that affidavit of default. So she nowhere in
7 her affidavit said that the order had been complied with by
8 it being mailed.

9 And, also, there is no certificate of mailing in
10 this court's file from which the clerk could have gleaned
11 that it had been complied with and properly served. So it
12 is defective again on it's face, and yet the clerk rubber
13 stamped this.

14 Now, subsequent to all of this taking place --
15 and I'm going to hand these up to you, Your Honor, which is
16 the affidavit of default and the motion and order of
17 default in reference to you. Subsequent to all this taking
18 place, when my clients learned of this and filed this
19 action to set aside all this, Ms. Serafino, at the original
20 hearing of this matter, produced a letter ostensibly dated
21 July 21st, 2011, in which it purports to mail to the
22 defendants the documents. The problem is, Your Honor, that
23 letter was not in existence, to the knowledge of the clerk
24 of the court, when she signed the order granting default.
25 All the clerk had in front of her was the affidavit of

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1 default of Ms. Serafino, which said that it had been
2 published, and nothing more.

3 You can't post facto come in and produce a letter
4 that supposedly was mailed, but which there is no
5 certificate of mailing, and say, "Oh, well, there was
6 jurisdiction." There wasn't. 'Cause it's the clerk's duty
7 to make sure that the order of publication has been fully
8 complied with, and there was no evidence in the record from
9 which the court could have gleaned that.

10 Julie Serafino then submitted an affidavit on
11 behalf of Mr. Tillman here to attempt to further address
12 that issue, and say, "Oh, yes, I mailed it." But she has
13 no certificate of mailing, and she's talking about
14 something that ostensibly happened almost 11 months prior.
15 And I think it's certainly untrustworthy to say that you
16 can rely upon that 11 months after the fact, when there's
17 no evidence that it actually was done.

18 Other documents by the Finger firm were all
19 accompanied by certificates of mailing filed with this
20 clerk's office, but that one was not.

21 And so the clerk, in making her ruling, was
22 operating in the dark, and had she looked at the affidavit
23 she would have noticed there was nothing in there about the
24 mailing, and she would have required Ms. Serafino to either
25 do a new affidavit proving that it had been mailed, or she

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1 would have denied the order. But, again, she rubber
2 stamped the matter, something that this court would never
3 do.

4 So for those two reasons, Your Honor, there is no
5 doubt that this court lacked the jurisdiction to go forward
6 with that hearing, and, therefore, the results of that
7 hearing should be set aside.

8 Now, in your own order, Your Honor, where you
9 passed upon the thing and issued the judgment on
10 foreclosure, you make no reference to those defects because
11 you were unaware of those defects. Nobody had brought them
12 to your attention because my clients weren't before you at
13 the time, and the plaintiffs did not bring them to your
14 attention.

15 But you do say in your order that service on the
16 defendant was made and shown in the affidavit of service.
17 Well, Your Honor, there is no affidavit of service. And
18 this is not your fault, 'cause this order was obviously
19 prepared by Mr. Finger's firm.* But there was no affidavit
20 of service.

21 There was an affidavit or a document of non
22 service, and there was an order of publication, and then
23 there was an affidavit of default, but there was certainly
24 no affidavit of service.

25 And then your order goes on to say, "Defendants

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1 are in default, as shown by affidavit of default." But,
2 again, you were unaware, having not issued that order, that
3 that affidavit of default was defective because the clerk
4 never required proof that the pleadings had been mailed to
5 the defendants. And you cannot go back and correct
6 jurisdictional defects after the fact like that. When you
7 do not have jurisdiction, you do not have jurisdiction, and
8 the court could not sell the property.

9 Now, the second aspect of the case deals with the
10 value of the property and the value shocking the
11 conscience. And what the court in its order has said is
12 that it's over 10 percent so it doesn't shock the
13 conscience of this court. The problem is the court relied
14 on defective information when it made that determination.

15 The court had two appraisals in front of it, Your
16 Honor, when you made that determination: one by the
17 plaintiffs and one by the defendants. The plaintiffs, the
18 Fingerhuts, who came into this case, submitted one to you
19 that suggested that the property was \$17,000.

20 Well, Your Honor, I would submit to the Court
21 that that is wholly inaccurate, because if you look at the
22 appraisal submitted by the plaintiffs, it relies on three
23 properties that are not even in the Bloody Point
24 Subdivision. They're in the Melrose Subdivision. Melrose
25 was in it's own bankruptcy at that time.

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1 They are three interior lots that sit on lagoons
2 and have a golf view in the Melrose Subdivision. The
3 property in question does have a golf view, like they do,
4 on the Bloody Point course, a course which has fallen into
5 a state of disrepair but which is in the process of being
6 renovated.

7 But more importantly, their property is second
8 row oceanfront. And according to the site plans -- which
9 I'm going to hand up to the Court -- the lots in the
10 subdivision, first and second row have to be staggered, so
11 that a property that sits on the second row has an
12 unobstructed view between the other houses to the ocean.

13 Now, Your Honor, they came up with a \$17,000
14 value. There hasn't been a piece of oceanfront property on
15 Hilton Head, Daufuskie Island, or any of the surrounding
16 communities go for under \$100,000 in probably 25 years,
17 maybe 30 years.

18 So when you look at this, you wonder, "Okay. Why
19 is it that this price is there?" Well, I will give the
20 Court what we wrote to the Court -- I'm going to hand it up
21 to the Court now, and I've got a copy for Mr. Tillman.
22 This is the MLS, a property known as lot 45, Fuskie Lane.
23 Lot 45 is on the same exact street as the street that my
24 clients' property sits on. It is second row oceanfront,
25 the same as my clients' property.

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1 As you can see from the front page, it was listed
2 at 149. It was assessed by the assessor's office at 140.
3 This property sold for 126,650, basically as late as 9/14
4 of this year.

5 You have attached to that the payment history of
6 the property at 70 Fuskie Lane, showing \$140,00 as their
7 value.

8 You have a picture of the beach in front of that
9 property. Same beach that runs in front of my clients'
10 property.

11 You have a picture of the ocean from the property
12 itself.

13 And then, lastly, you have a depiction of where
14 that lot sits on the opposite side of Fuskie Lane from the
15 beach. And if you look between 45 Fuskie Lane and the 18th
16 hole of the golf course, you see a rather large expanse of
17 property there, and that is basically wetlands, waste area,
18 some marsh and so forth.

19 Now, if you look at the property that we gave you
20 with the appraisal, Your Honor, that you got along with our
21 motion for reconsideration, you will see that my clients'
22 property sits in the exact same thing. It's .1 acres
23 smaller. So instead of .53, it's point -- well, instead of
24 .63, it's .53 acres.

25 However, my clients' property backs directly up

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1 to the golf hole, so they are on the golf course, not
2 separated by a waste area or marsh or whatever you want to
3 call it.

4 Also, my clients' property is in the same
5 proximity to the ocean as theirs is. When you look at the
6 appraisal you will see how it sits, in between two lots on
7 the front side. So it's got a clean oceanfront view.

8 This property is basically identical to our
9 property. And the reason I can say that is, while it's a
10 little bit bigger, it doesn't have the access to the golf
11 course that my clients' property does, which is walk out
12 the back of your lot and you're on the golf course. They
13 have to go over a 100 yards of wetlands area and stuff that
14 they're not allowed to walk through.

15 So, basically, although there's a little
16 difference in size, that difference would clearly make up
17 for any difference in value for the size. And that it sits
18 next to oceanfront cannot be denied.

19 The appraisal by the plaintiffs does not make any
20 mention of the fact that my clients' property is second row
21 oceanfront. Instead, it claims the second property is golf
22 course. You just can't do that. That is totally
23 misleading. Because when you are across the street from
24 the ocean, there's one row of houses in front of you and
25 you've got a clear view between them to the ocean, that is

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1 worth a ton of money.

2 So I would submit to the Court that the true
3 value of my clients' property is in that exact neighborhood
4 of 126,650.

5 The value spent by the plaintiffs to obtain this
6 lot was basically 11 thousand and some dollars. And I have
7 to apologize. \$11,530, I believe. And I have to apologize
8 to Mr. Tillman and to the Court, because in my letter to
9 you I reference the \$8,800 purchase price and left that
10 off. And it was my fault only because I was not here at
11 that earlier hearing. My associate was here and I forgot
12 to add that.

13 So Mr. Tillman is --

14 THE COURT: You're adding in the cost to pay off
15 the --

16 MR. BERL: Yeah. So Mr. Tillman is 100 percent
17 correct. It is 100 -- it was \$11,530, I believe.

18 BY MS. BERL:

19 So the question then becomes: What is shocking
20 the conscience? Well, he says you have to take 10 times
21 that amount to shock the conscience. Well, that's not the
22 law, Your Honor. The law, as started with Poole, and has
23 come through every case in which both sides cite it, it
24 says the court has absolutely declined to draw a bright
25 line test. That if it's below 10 percent, it shocks the

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1 conscience. They look at factors in and around it.

2 Now, virtually every case that has been below the
3 10 percent has shocked the conscience. But the Poole case
4 was actually 12.5 percent. And if you took the value of my
5 property and took 12.5 percent of it -- my clients'
6 property, it's not mine; wish it was -- and took 12.5
7 percent of that, you would be well above what the value
8 they paid for it. In fact, if you take it at 126, which is
9 what the other identical property basically sold for, it's
10 above that threshold and, therefore, you are actually
11 looking at less than 10 percent, which as the Court noted,
12 has been there.

13 So I would submit to the Court that the test
14 performed by the Court saying that it would have to be
15 \$115,000 to shock the conscience is an erroneous standard,
16 'cause the law clearly says you can't just do a bright line
17 test of 10 percent. You have to look at all the factors.

18 And when you look at the factors here, you can
19 tell that there are circumstances which require this court
20 to set it aside.

21 First of all is the jurisdiction aspect.

22 Second of all is the fact that they went to
23 publication without doing anything else that they should
24 have done.

25 Third of all is that, while they claimed to be

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1 good purchasers for value, they don't meet the criteria,
2 because as the plaintiff's own affidavit states, he looked
3 at the notice of sale. And as one of their own cases said,
4 that's not the standard. It was Robinson versus Estate of
5 Harris, and on page 5 of 6 of that, Your Honor -- which I
6 can give to you if you want to see it -- the court clearly
7 stated that you must check the jurisdiction of the court,
8 and the notice of sale doesn't say anything about the
9 jurisdiction of the court.

10 You have to go behind the test and see what's
11 there. If you don't do that, you basically proceed at your
12 own risk. When we do any kind of work for clients who want
13 to buy properties at foreclosure, first thing we always do
14 is get a title search to see what's out there. And the
15 first thing we get is all the documents from the
16 foreclosure file to see if the I's are dotted, the T's are
17 crossed, that give the court jurisdiction. It wasn't done
18 in this case by the plaintiffs, as admitted by Mr.
19 Fingerhut in his own affidavit. And had he done so, he
20 would have clearly seen the defects in the jurisdiction of
21 this court. So he can't be a good faith purchaser for
22 value, Your Honor.

23 He also, one needs to know, is not your average
24 guy. He is a licensed real estate attorney of over 20
25 years. He has bought seven investment properties down

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1 here, three of which were bought at foreclosure sales. So
2 he knows the drill and he knows that there are risks
3 associated with buying foreclosure property if you don't do
4 your due diligence, and he didn't do any due diligence. He
5 simply saw the notice of sale, went to the bidding and
6 bought the property. So he cannot qualify as a good faith
7 purchaser for value.

8 Your Honor, I believe that covers all of the
9 aspects of this. I do have that case, if you'd like to see
10 it. It was attached to Mr. Tillman's brief, and I can hand
11 up -- well, as I said, on item five -- or page five of that
12 case states, "It further is a public policy a purchaser in
13 good faith at a judicial sale is not affected by
14 irregularities in the proceedings or even error in the
15 judgment under which the sale is made, but is required, at
16 his peril only, to make inquiry as to the jurisdiction of
17 the court which ordered the sale and whether all proper
18 parties were before the court when the order was made."

19 In this case, my clients were not properly before
20 the court when that order was made because jurisdiction was
21 defective. And in the case at -- in that actual case, at
22 the very bottom of that page, the last line, says -- talks
23 about affidavits that were submitted after the fact. He
24 says, "None of these affidavits, however, were matters of
25 record at the time of the foreclosure sale."

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1 What was of record at the time of the foreclosure
2 sale, Your Honor, is what I've given you, which clearly
3 shows there's a defect in jurisdiction, and from which he
4 would have known that he should not bid on that property
5 because all the parties were not properly before the court,
6 as required by the statute and required by the case law.

7 So, Your Honor, I would respectfully submit that,
8 unfortunately, you didn't have all the facts in evidence
9 when you made your decision at the previous hearing. I
10 think you now have everything, and I think from that you
11 can clearly say that there was a problem and that the
12 problem was insurmountable. It was a jurisdictional defect
13 and, therefore, you were wrong to deny our motion to vacate
14 previously, and in reconsideration you should, in fact,
15 grant that motion to vacate the sale and to return the
16 property to my clients.

17 Thank you for your time, Your Honor.

18 THE COURT: Thank you. Happy to hear from you,
19 sir.

20 MR. TILLMAN: Thank you. Do you mind if I sit,
21 as well?

22 THE COURT: Oh, please sit.

23 MR. TILLMAN: Okay. Your Honor, first of all,
24 you had all of this when you made your initial ruling. All
25 this is in the record. Everything he handed up today is in

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1 the record. It's either attached to their original motion
2 to vacate or my memorandum in opposition. You considered
3 it all and made the correct ruling in this case.

4 But I'll start by responding to his discussion on
5 the sales price and I'll move through to the service issues
6 afterward, if that's okay with Your Honor.

7 On the sales price, the Eastern Savings Bank case
8 that we cited in our memorandum in opposition to the motion
9 to vacate clearly says that it appears that the court --
10 and I'm paraphrasing, obviously -- it appears that the
11 courts in South Carolina find that the sales price is so
12 grossly inadequate as to shock the conscience when they are
13 less than 10 percent of the actual value of the property.
14 That's the standard you adopted in your order. I don't
15 think there are any mitigating factors that require any
16 deviation from that standard.

17 Now, while he's correct that there is no --
18 necessarily a bright line rule, that seems to be where the
19 court is going, and it's a clean number, for sure.

20 And so to use 10 percent number -- and, also, I
21 don't know that it matters in this case anyway, but that
22 being said, if you use that 10 percent number, then the
23 threshold price we're talking about is \$115,932.

24 What was before you at the prior hearing -- the
25 original hearing on this matter, were several pieces of

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1 evidence dealing with the value of the property. One was
2 the Whitten appraisal, which my client submitted. And I
3 find it funny that he characterizes that appraisal as
4 totally misleading because that appraisal was done for the
5 purpose of obtaining title insurance, and not for the
6 purpose of supporting value in this case.

7 We argued that before. It was -- Mr. Fingerhut
8 and Ms. Santree needed title insurance after they purchased
9 the property. The title insurance company told them to go
10 get an appraisal; they did. That's the number they came
11 back with: \$17,000.

12 In their -- in the Ashtons' memorandum in support
13 of their motion to reconsider, they even note the email by
14 which Mr. Fingerhut was disappointed with the low value of
15 that appraisal. So there's nothing totally misleading.
16 There's nothing under the table there. It was an
17 absolutely arms-length appraisal, where the marching orders
18 were, "Please just value the property so I can obtain title
19 insurance." It had nothing to do with this proceeding.

20 I also want to note, and I did in the earlier
21 hearings, that the Whitten appraisal uses actual sales of
22 interior lots on Daufuskie. And, again, it wasn't done to
23 support any particular value.

24 Also, we submitted the 2010 tax sale documents
25 related to this lot, whereby this property was sold at

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1 \$10,000 at a competitive bid tax sale. So at that time,
2 those two numbers aren't too far off. That would indicate
3 between 2010 and January 2012, we've got a 10 to \$17,000
4 value, roughly.

5 And in our -- and supplementally, in our October
6 9th, 2012 letter, we also submitted a deed for 47 River
7 Road, an interior lot on Daufuskie, which sold on April
8 30th, 2012, for \$75,000, and also a recent competitive bid
9 tax auction for 16 Fuskie Lane, where it sold for 23,000.

10 So all of those values would certainly support
11 our position that this purchase price at the foreclosure
12 sale was more than fair -- was more than a fair
13 representation of the actual value.

14 I want to contrast that with the evidence that
15 the Ashtons have put forward. They put forward this
16 appraisal by Ms. Paige that was done in April of 2011. For
17 an interior lot she uses only MLS listings; does not use
18 actual sales comps for anything but oceanfront property.
19 She uses MLS for the interior lots. And, as you know -- or
20 as you might suspect, MLS listings now and then are
21 typically a prayer.

22 And, also, probably more importantly, it was done
23 solely for the purpose of supporting the very arguments in
24 this case: The value of the property for use in this
25 litigation. It says so in an introductory page of that

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1 appraisal. And so that is not a reliable appraisal to rely
2 on.

3 Second, Mr. Berl sent a letter on September 28th,
4 2012, and he notes this \$126,500 sale of this 70 Fuskie
5 Lane. He handed up the MLS sheet to you a little while
6 ago. Keep in mind, this was on his own appraiser's -- in
7 his own appraiser's appraisal at page 3. She valued this
8 lot in April of 2012 much closer to the January 2012 sales
9 date at 170,000 -- excuse me, 107,000. It was valued in
10 that appraisal at 147, but reduced to 107,000 to compensate
11 for -- I think it was a 28 percent negotiation or reduction
12 rate given recent negotiations in sales.

13 And so effectively, in April 2012, their own
14 appraiser values that comparable lot at \$107,000. And, you
15 know, that's maybe a decent value, 'cause if you look at
16 the \$126,500 sales price, which occurred very recently in
17 September, it -- and you adjust that for the difference in
18 size between that lot and the subject lot, which was .63
19 acres and .53 acres, the reduced value is 106,000. And so
20 it looks like those numbers are pretty close to each other.
21 They both come from the Ashtons, and neither one eclipses
22 that \$115,000 threshold number.

23 And, also, I want to point out, and I think it
24 may have been pointed out in their motion to reconsider,
25 that there have been some significant improvements since

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1 January 2012 in the Bloody Point, Daufuskie Island area.
2 The golf course has either been rebuilt or is close to
3 having been rebuilt and opened. So prices are on the rise.

4 But what we're talking about is whether the
5 actual value on January 3rd, 2012, the date of the
6 foreclosure sale, was more than \$115,000. And really
7 there's no evidence to show it was. That's what you found.
8 It was a correct ruling. Our evidence is more reliable.
9 It uses actual sale data of interior lots.

10 And so we feel like you ruled correctly the first
11 time. Nothing new has been presented to you, besides this
12 \$126,000 sale of a larger lot, which was valued by their
13 own appraisal at 107,000 in April 2012, so we feel like you
14 were correct in that.

15 Moving on to the service by publication. There
16 really was nothing new on this. Everything that was just
17 presented to you was argued and dealt with not only in the
18 initial hearing, but in our follow-up telephone
19 conferences.

20 As you may remember, the deputy in Pennsylvania
21 attempted service four times. Three times during the day,
22 one time at night. He couldn't find the Ashtons. As I
23 think you may have pointed out in one of the hearings, it
24 appears that they may have been dodging service, if they
25 were there.

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1 And then that left the attorneys for Bloody Point
2 with a quandary. We've got -- this is their last known
3 address, but nobody seems to be -- we can't serve them
4 there, despite four attempts. We don't really know where
5 they live.

6 So then you have to publish in the newspaper most
7 likely to achieve notice on the property owner. And the
8 one place that they did know that these folks owned
9 property was in Beaufort County, and they published it in
10 the Island Packet. That was approved by the order of
11 publication. They published -- they published it in
12 conformance with that order. Your Honor approved that
13 service effectively by granting the -- you know, by
14 ordering the property to be sold.

15 And, again, there's just -- there are no new
16 arguments.

17 And as to his arguments regarding the clerk's
18 decision to issue the order for publication, I don't
19 believe that can be attacked as jurisdictional. That's the
20 court's -- that's the clerk's discretion to issue that
21 order for publication.

22 The real issue is whether -- if you look at the
23 case law, the real issue is whether the newspaper where
24 it's published is the newspaper that is most likely to
25 achieve notice to the property owner. You found that it

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1 was. We think that's the right call. There's no way to
2 tell if these guys were or weren't in Pennsylvania. I
3 mean, you try four times to serve them and you can't serve
4 them, who knows who lives there at that point?

5 And so, again, we feel like that was a correct
6 order.

7 Going to the Julie Serafino issue, the issue with
8 whether the summons and complaint were mailed in accordance
9 with the order of publication. There was some discussion
10 about that being jurisdictional and that the court didn't
11 -- or excuse me, the clerk didn't have the power to issue
12 an order of default.

13 The fact of the matter is, Julie Serafino and the
14 attorneys for Bloody Point did, in fact, mail the summons
15 and complaint. The letter is in the record. So was her
16 affidavit affirming that she did mail it in the record.

17 Again, there were some argument that there was
18 some malfeasance there, that maybe that's unreliable
19 because it's after the fact. But I'm not sure why an
20 attorney would stick their neck out and manufacture both a
21 letter and an affidavit saying we mailed it. That seems to
22 be a little bit of a stretch.

23 So, anyway, before you then and before you now
24 are a letter dated back during the foreclosure proceedings
25 where the summons and complaint were properly mailed to

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1 their last known address. You have Julie Serafino's
2 affidavit saying yes, I did do it, so the order of
3 publication was complied with. Therefore, the order of
4 foreclosure was appropriate.

5 And in getting down to the issue of the bonafide
6 purchaser for value statute, on that point -- and as you
7 know, as we've argued in this case, the bonafide purchaser
8 for value statute basically says if you buy a property at a
9 foreclosure sale, you're entitled to rely on the court's
10 record. You're entitled to rely that it was an appropriate
11 sale and you've got good title as to prior owners.

12 The case we cited in support of that was the
13 Robinson versus Estate of Harris case. In that case the
14 court found that all of the elements for a bonafide
15 purchaser for value were reflected in the court record.
16 There was a default. There was notice -- a court finding
17 -- a court order finding there was appropriate notice to
18 the owners and appropriate service, and an affidavit of
19 nonmilitary service.

20 There was no discussion of having to look behind
21 what the court's done to see, you know, whether there were
22 irregularities in the process and so forth. I don't think
23 there were irregularities here, frankly, but even if there
24 were, the foreclosure buyer has got to be able to rely on
25 the court record and that's what Robinson has said. I

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1 mean, Robinson is exactly -- is effectively -- it's not the
2 exact same, but it is a service case where former owners
3 came and said -- and argued that we weren't properly served
4 and, therefore, you aren't a bonafide purchaser for value.
5 We want the foreclosure sale overturned.

6 The court said no. The court record reflected
7 that you were properly served and, therefore, the buyer had
8 the right to rely on that. The foreclosure buyer has a
9 right to rely on that and they're bonafide purchasers for
10 value.

11 And so that's the very backed up argument if you
12 get to -- if you get to a situation where you've got a
13 grossly inadequate sales price, you've got a service issue.
14 They're still bonafide purchasers for value.

15 And I do want the Court to think about the policy
16 implications of what would happen if you've got a situation
17 where any foreclosure buyer basically has to look behind
18 the court to determine whether there were irregularities in
19 the process every time they go to buy. That would really
20 affect the demand for properties to be purchased at
21 foreclosure because you'd -- you know, the buyers wouldn't
22 have the ability to rely on bonafide purchaser for value
23 statute. They'd be constantly worried about the property
24 being taken away from them and so forth. And I just don't
25 think the case law supports a standard that requires that

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1 sort of inquiry by the foreclosure buyer.

2 There was some discussion about us not -- my
3 clients not performing a title search until after the
4 foreclosure sale. And, keep in mind, a title abstract
5 would have revealed only what the court file revealed, and
6 so it's six of one, half a dozen of the other. That's the
7 same argument as saying they needed to go back behind the
8 court and look at the court file.

9 And, again, there was nothing in the file that
10 indicated improper service. The court specifically held
11 there was proper service, ordered the foreclosure sale to
12 happen. My clients relied on that and, therefore, they're
13 bonafide purchasers for value.

14 If the Court has any questions for me, I'd be
15 happy to take them.

16 MR. BERL: Your Honor, may I ask the Court's
17 indulgence for just a minute? I did not mean to be rude,
18 involved on my cell phone while Mr. Tillman was arguing.
19 But my wife has just texted me that she's stranded. Her
20 car broke down and I'm trying to get her situated.

21 THE COURT: Oh, yeah.. Let's go off the record
22 for a second.

23 MR. BERL: Thank you. I appreciate that. It'll
24 take me just a minute.

25 (A brief break was taken.)

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1 MR. BERL: Your Honor, I didn't mean to
2 interrupt.

3 THE COURT: No, that's all right.

4 MR. BERL: Mr. Tillman asked you if you had any
5 questions. I have a little bit of reply.

6 THE COURT: Yeah, go ahead.

7 MR. BERL: Thank you, Your Honor. Your Honor, I
8 would ask this court, which of course is the Court of
9 Equity, how could it be equitable for people who paid over
10 \$200,000 for this property, and who's property has devalued
11 some by virtue of the economy, to then be deprived of it
12 when they weren't given proper notice required under the
13 statute?

14 The statute very clearly says it must be in the
15 newspaper most likely to reach them with notice. And the
16 reason for that is very clear. We all know that service by
17 publication is the least effective means to reach a
18 defendant and serve them with notice of a court hearing.
19 That is why this court has uniformly required more than
20 just one effort to reach them by a deputy sheriff. They've
21 required that you send it by certified mail, return receipt
22 requested, and get back either a refusal to accept or an
23 undeliverable or unclaimed.

24 That is why this court has routinely said no,
25 call a private process server.

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1 That's why this court has said get a skip trace.
2 Find out where they are.

3 So that when we do publication, we at least have
4 done everything we possibly could have beforehand to give
5 them notice.

6 And, secondly, that it's got the best chance of
7 reaching them.

8 There is absolutely no way that this court,
9 specifically the clerk of court, had anything on which to
10 base her belief that the Beaufort County -- or Island
11 Packet was going to reach my clients. This was an
12 undeveloped lot on Daufuskie Island. This was not a home,
13 this was not a condo, this was not a place they could be
14 residing.

15 So everything in the records, including the tax
16 sale and everything else, clearly indicated they were still
17 living in Pennsylvania, and that's where it should have
18 been served.

19 There's a case out there, Brown versus Malloy.
20 It was a domestic relations case, Your Honor. I think Mr.
21 Ferrell gave it to you before, but I have a copy of it here
22 for you if you want it. And in that case it was about an
23 adoption, and the person lived one county over from where
24 the publication was. It was published in Los Angeles
25 County; he lived in Orange County. Literally five miles

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1 from the line. The court held not adequate to give him
2 notice and set aside the adoption because of it.

3 So for this court to say 600 miles plus is
4 adequate notice, just doesn't pass the good smell test, and
5 it doesn't comply with the statute.

6 With regard to Mr. Tillman's comments about
7 misleading appraisal, I did not mean to insinuate, and I
8 want to clear the air, that it was not intentionally
9 misleading. It was just a totally terrible appraisal,
10 because when you're dealing with oceanfront properties, you
11 have to have like-kind properties. There is no comparison
12 between a lot that sits 1.5 miles inland from where they
13 are and a property that sits on the second row ocean. Not
14 even remotely similar.

15 But the neat thing to notice is in that
16 appraisal, he didn't note their property as being
17 oceanfront. He didn't note it as being second row ocean.
18 The appraisal we commissioned, why did they use oceanfront
19 property? 'Cause that's the most similar property. It's
20 right there across the street from them. And the ones they
21 gave you in that appraisal actually sold for 300-plus
22 thousand dollars, each of them, as stated in that
23 appraisal. They weren't speculative, they weren't
24 listings. They were actual sales that had happened prior
25 to the sale of this property.

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1 The ones that were listings, the appraiser trying
2 to be conservative, took the approach of a 28 percent
3 reduction to be negotiated value. But as it turns out,
4 that was too much, because the property that did sell,
5 virtually the identical property, because the difference in
6 size is certainly made up by the proximity to the golf
7 course, that property sold for \$126,650. And that's the
8 clearest indication of what the fair market value of this
9 property is.

10 Now, Mr. Tillman cited to you two additional ones
11 that transpired -- or, actually, three. He mentioned the
12 tax sale, he mentioned a 75,000 for an interior lot, and
13 then he mentioned another one that was another tax sale.

14 Well, Your Honor, a tax sale is not a measure of
15 a fair market value of a property. A tax sale, as we all
16 know, is the bottom feeders coming out to get whatever they
17 can at the lowest possible price. They value it, they pay
18 the taxes, and as little above that as they can get away
19 with.

20 So to say that the \$10,000 price of a tax sale
21 somehow is market value? No. Fair market value has been
22 defined by this court as what a willing seller and a
23 willing buyer agree to. You don't have a willing seller
24 when you have my clients' property taken by a tax sale.
25 You don't have a willing seller when that other property.

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1 that Mr. Tillman cited was taken by a tax sale.

2 What you did have was a willing seller and buyer
3 on that \$75,000 interior lot, and that was in April, as I
4 recall. If that interior lot's worth that, how much more
5 is a second row ocean worth? Quite a bit.

6 The other thing that's interesting was in that
7 appraisal, he mentioned -- of the three lots that he used
8 interior, which happened to be in Melrose, two of them were
9 bank foreclosure sales. That's not a fair market value
10 when a bank sells a property. That's not a willing seller
11 and a willing buyer. That is a bank unloading property for
12 whatever they think they can get for it, and that is a
13 buyer who's looking for a bargain.

14 But what you do have on ours that we gave you is
15 126,650 between a willing seller and a willing buyer, on
16 the same street, basically the same exact property.

17 We talked about -- Mr. Tillman talked about the
18 value at 107, based on that 28 percent negative margin.
19 That margin, obviously, was not correct and, therefore, we
20 would submit that the best measure is what it actually sold
21 for.

22 The order of publication was not supported by the
23 affidavit. That is a jurisdictional defect. The clerk
24 doesn't get to make the decision based on insufficient
25 evidence. It's got to have the evidence. There was

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1 nothing in Ms. Serafino's affidavit that in any way would
2 have led the judge to move -- or the clerk to the
3 conclusion that the -- by advertising in Beaufort County
4 and the Island Packet was most likely to reach my clients.
5 Nothing. The affidavit has to say something so that when
6 the clerk puts her rubber stamp on that deal, it has
7 evidence supporting the fact that she picked that. That's
8 her job. Or, more often than not, that's your job, and you
9 have always done that to make sure that the property is
10 going -- or the notice is going to where it's most likely,
11 as required by the statute.

12 Mr. Tillman suggested that maybe I was
13 insinuating malfeasance on Julie Serafino's part. Not in
14 the least, Your Honor. I would never submit that to this
15 court about Julie. What I am suggesting, though, is that
16 the rules require the clerk to look at the record that's in
17 it's hands at the time that it's issuing the order.
18 Julie's letter was not of notice to the clerk at that time.
19 It was not in the record, there was not a certificate of
20 mailing. The first it was brought to anyone's attention
21 was when we brought this case and at the initial hearing of
22 this case, or this motion to set aside. That's the first
23 anyone had notice that Julie says that she had complied
24 with that.

25 The clerk doesn't get to look and say after the

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1 fact, "Oh, well, it was done." No. It's when the clerk is
2 presented with it, she must make the determination at that
3 time.

4 And as far as the bonafide purchaser for value, I
5 think if you look at the case I cited, which was their own
6 case, the standard is there, Your Honor. And the standard
7 is you do have to look to make sure jurisdiction exists.
8 And that's why anyone who's intelligent about purchasing
9 properties at foreclosures always gets a title search,
10 always has the title searcher examine fully the foreclosure
11 thing to make sure all the I's are dotted and T's are
12 crossed, because if they're not, it's going to be set
13 aside, and when it's set aside, they lose. That's just the
14 way it goes. So that's why it says in that case, it very
15 clearly says, they're required to do that or they proceed
16 at their own risk.

17 And so, Your Honor, I think for the reasons
18 stated, and the new evidence which has been brought to
19 light before the court -- because I don't think it was
20 pointed out to the court these defects as clearly as they
21 are in the documents that gave rise to the orders that are
22 defective -- had the court clearly understood that, I don't
23 think this court could have said there was jurisdiction.
24 So for that reason, Your Honor, I respectfully submit the
25 order must be set aside.

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1 Thank you, Your Honor.

2 THE COURT: All right. Anything else?

3 MR. TILLMAN: Just a couple points, Your Honor.

4 Mr. Berl said that there was a problem with
5 relying on the sheriff's failed -- the sheriff's failed
6 attempt to serve the documents on his clients to support
7 the order of publication. I'm not aware of that being the
8 law under the statute or otherwise.

9 The clerk was presented with an affidavit from
10 the Pennsylvania sheriff who said, "I went four times. I
11 couldn't find them at this address." That was the last
12 known address and the clerk issued the order of
13 publication. That was entirely appropriate under the
14 publication statute.

15 I also want to address the equity issue. And
16 this court obviously is a Court of Equity, but I want to
17 recall from our prior hearings, and the documents that were
18 attached to my memorandum in opposition to their initial
19 motion, that there were at least three sets of documents
20 related to this foreclosure mailed to Mr. Berl's clients
21 prior to the order of foreclosure being entered in this
22 case. They were mailed to the address that they now admit
23 is their address, even though they couldn't be served,
24 despite four attempts.

25 And so not only were there four attempts to serve

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1 them, there were also at least three packets of documents
2 mailed to that address, which were evidently ignored. I
3 mean, I don't know without having them testify, but the
4 record will reflect that letters were sent, and there are
5 filed certificates of mailing in the court file to that
6 effect.

7 The Brown versus Malloy case, I'd have to go back
8 and read it, but I don't think the court there, per se,
9 ruled that the order of publication was defective because
10 it was not in the publication most likely to give notice.
11 I think it was sent back to the trial court to make that
12 determination. Don't hold me to that, but I believe that's
13 what that case says.

14 You know, we've had some speculation about our
15 appraisal -- my client's appraisal being a poor appraisal
16 based on comps and so forth. But all I can do is reiterate
17 to the court that it was done solely for the purposes of
18 obtaining title insurance and the amount of title
19 insurance. I don't know why the appraiser would have done
20 a poor job or tried to artificially deflate the value. It
21 seems to be much more reliable than an appraisal done for
22 the sole purpose of supporting a value in this case, as
23 their appraisal was done.

24 The \$126,650 for the property that Mr. Berl
25 references was a sale. It did happen, it is in the same

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1 neighborhood, but it happened in September of 2012. That's
2 nine months after the foreclosure sale happened.

3 And, again, Your Honor, back in April, when their
4 appraisal was done, they valued that lot at \$107,000. So I
5 don't think it's accurate to say that appraisal was
6 incorrect. I think it's accurate to say that appraisal
7 valued at 107,000 as of April, which was three months after
8 the foreclosure sale, versus the actual sale, which
9 occurred nine months after the foreclosure sale, and also
10 after the golf course had been fully redeveloped, and I
11 believe it's open now, I'm not sure.

12 There was some discussion about the fair market
13 value of the property. This may be a distinction without a
14 difference, but I do want to point out to the court that
15 the standard is actually whether the actual value of the
16 property is -- whether the actual sales price is less than
17 10 percent of the actual value. There's no reference in
18 case law to fair market value. Now, that may be a
19 distinction without a difference. It may be the
20 difference, I'm not sure. I just wanted to point that out
21 to you.

22 And I also want to point out to the Court that
23 the order for publication -- excuse me, the order for
24 publication was complied with. Julie Serafino did mail the
25 summons and complaint. It wasn't part of the court record,

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1 there wasn't a certificate of mailing in the court record,
2 but that doesn't change the fact that she complied. The
3 attorneys for the Bloody Point did comply.

4 I'm unaware of any law that says that's
5 jurisdictional, that there has to be a certificate of
6 mailing in the record. All it says in order for
7 publication is that you mail it to the last known address
8 based on some parameters. I think it's certified mail or
9 something like that, and that was done. Julie Serafino
10 said in her affidavit she did that and that's on the
11 record.

12 And, again, Your Honor, we believe that none of
13 this really matters anywhere because my clients are
14 bonafide purchasers for value under the statute. The
15 Robinson case is almost on point. It deals with an
16 argument that it was improper service. The owners that had
17 been foreclosed on came back and challenged and sought to
18 overturn the foreclosure sale. The court said no. The
19 court record reflects that there was proper service. The
20 court record reflects that there was an affidavit of
21 nonmilitary service and that there was an order of default.
22 Therefore, these folks who bought the property were
23 bonafide purchasers for value. That's what we have here.
24 And I just encourage you to read the Robinson case if you'd
25 like more instruction on that point.

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1 So, anyway, I think that's all I have. I'd be
2 glad to hear any questions.

3 MR. BERL: Your Honor, just finally. When you
4 look at the shocks the conscience, we know the Fingerhuts
5 paid about \$11,000 and something for this property. Today
6 they stand to make \$126,650 on this same property. That's
7 more than 10 times what they paid. That's absolutely
8 shocking of the conscience when you compare it to the
9 people who paid \$200,000 for the property and are being
10 deprived of it because they didn't get the notice they
11 should have gotten.

12 That's all.

13 MR. TILLMAN: Your Honor, one more thing. The
14 question is not that. The question is: Could the
15 Fingerhuts have turned around the next day and sold the
16 property for \$126,500?

17 THE COURT: Thank you very much for your
18 arguments. Let's go ahead and go off the record on this.

19 (WHEREUPON, the hearing was concluded at
20 approximately 2:39 p.m.)

21
22 o0o
23
24
25

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	2012 FEB 27 AM 10:24
	)	CASE NO. 2012-CP-07-
William A. Ashton, Jr. and	)	2012-LP-07-0182
Michele C. Ashton,	)	JENNIFER ROSENBAUM
	)	BEAUFORT COUNTY, S.C.
	)	CLERK OF COURT
	)	
Plaintiff,	)	
	)	
v.	)	LIS PENDENS
	)	
David L. Fingerhut and	)	
Patricia M. Santry,	)	
Defendants.	)	
	)	

NOTICE IS HEREBY GIVEN THAT an action has been or will be commissioned in this Court upon complaint of the above-named Plaintiffs against the above-named Defendants to set aside and/or vacate the foreclosure sale and to void that certain Master in Equity Deed dated January 6, 2012, which was recorded on January 11, 2012 in the Office of the Register of Deeds for Beaufort County, South Carolina, in Book 3111 at Page 1291.

The premises covered and affected by the foreclosure sale and said Master In Equity Deed is described as follows:

ALL that certain piece, parcel or lot of land, lying and being on Daufuskie Island, Beaufort County, South Carolina, known and described as Lot Number Fifty-Five (55) Daufuskie Island Club, Phase I, Bloody Point, and being more particularly shown and described on a plat thereof recorded in the Beaufort County Records in Plat Book 37 at Page 12 and revised in Plat Book 50 at Page 101. For a more detailed description as to courses, metes and bounds, reference may be made to said plat of record.

This property is subject to all applicable covenants, conditions, restrictions, easements and/or rights-of-way filed of record in the Office of the Register of Deeds for Beaufort County, South Carolina, including, but not limited to, those certain Declaration of Covenants, Conditions and Restrictions for the Daufuskie Island Club Homesites, dated October 26, 1989 and recorded in the Beaufort County Records in Deed Book 539 at Page 1350, as amended.

This being the same property conveyed to the within William A. Ashton, Jr., M.D. and Michele C. Ashton by Deed of North American Telecom, Ltd., dated June 6, 2001 and recorded June 12, 2001 in the Office of the Register of Deeds for Beaufort County, South Carolina in Record Book 1431 at Page 32.

TMS# R800 027 00A 0055 0000

LAW OFFICES OF JAMES F. BERL, P.C.

By:



John W. Farrell

James F. Berl

Attorneys for Plaintiff

70 Main Street, Suite 400

P.O. Box 22626

Hilton Head Island, SC 29925-2626

(843) 689-5771

Hilton Head Island, South Carolina
This 1st day of February, 2012.

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-07-2176

BLOODY POINT PROPERTY
OWNERS' ASSOCIATION, INC.,)

Plaintiff,)

vs.)

WILLIAM A. ASHTON, JR. and)
MICHELE C. ASHTON,)

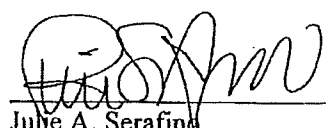
Defendants.)

AFFIDAVIT FOR ORDER
OF PUBLICATION

11 JUL 20 AM 11:17
CLERK OF COURT
BEAUFORT COUNTY, S.C.

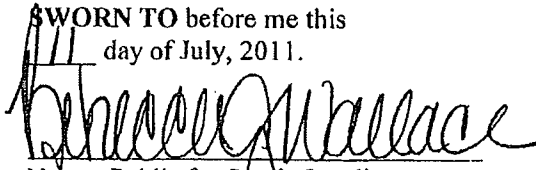
PERSONALLY appeared before me Julie A. Serafino, Esquire, who, on oath, deposes and says that she is the attorney for Plaintiff, Bloody Point Property Owners' Association, Inc., in the above entitled action; that said action has been commenced by the issuance of a Civil Action Coversheet, Certificate of Exemption From Administrative Order, Lis Pendens, Summons and Complaint; a cause of action exists in favor of Plaintiff against Defendants William A. Ashton, Jr. and Michele C. Ashton to foreclose a certain lien on the real property as described more fully in the Complaint. A diligent search to perfect service upon Defendants William A. Ashton, Jr. and Michele C. Ashton proved unsuccessful as is shown by the Affidavits of Non-Service filed herein. The said Defendants' present whereabouts are unknown and said Defendants cannot be found within this State.

FINGER & FRASER P.A.


Julie A. Serafino
P. O. Box 24005
Hilton Head Island, SC 29925-4005
(843) 681-7000
Attorneys for Plaintiff

July 11, 2011
Hilton Head Island, South Carolina

SWORN TO before me this
11 day of July, 2011.


Notary Public for South Carolina
My Commission Expires: 1-13-21

2B.1C. * 11-2176
2011-90757-505

STATE OF SOUTH CAROLINA)

2011 JUL 11 PM 4:17
COUNTY OF BEAUFORT)

BLOODY POINT PROPERTY)
OWNERS' ASSOCIATION, INC.,)

Plaintiff,)

vs.)

WILLIAM A. ASHTON, JR. and)
MICHELE C. ASHTON,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-07-

MICHELE C. ASHTON
120 MARLBROOKE WAY
KENNETT SQUARE, PA
19348

AFFIDAVIT OF SERVICE

SHERIFF'S COSTS

Date 5-24-11

\$ 150 Paid

Receipt No. 442089

Expiration date: 6-16-11

RECEIVED
SHERIFF'S OFFICE
CHESTER COUNTY, PA.
2011 MAY 23 AM 10:22
5/26

Personally appeared before me, _____, the undersigned deponent, who first being first duly sworn, deposes and says that s/he served a copy of a Civil Action Cover Sheet, Certificate of Exemption from Administrative Order, Lis Pendens, Summons and Complaint on MICHELE C. ASHTON, a Defendant in the above action by the following method:

- () By delivery to _____ personally at _____ (address), in _____ on the _____ day of _____, 2011.
- () By delivery to _____, a person of suitable age and discretion at the residence of Defendant, leaving with him/her a copy (or copies) of the same at _____ (address), in _____ on the _____ day of _____, 2011.
- () By delivering a copy (or copies) to an agent authorized by appointment or by law to receive service of process _____.

The Deponent is not a party of this action and has no interest therein or connection therewith. Service of Process was made in accordance with applicable statutes and the Rules of Civil Procedure in effect at the time of service.

() MILITARY STATUS: Y N If yes, what branch: _____ Type of ID: _____

Sworn to before me this 14th day of
JUNE, 2011.

[Signature]
Notary Public of Pennsylvania

My Commission Expires: 12/6/2011

Deponent's signature

Attempts ① 5/31 @ 11:32 AM N/A - Garage Door Open
Vehicle In Driveway.

② 6/6/11 @ 9:50 AM N/A

③ 6/6 @ 7:08 PM N/A

④ 6/14 @ 11:30 AM N/A

No Answer on 4 Attempts. No Service. 15

Kurt Hansen

2011-90757-505
2011-11-2176

STATE OF SOUTH CAROLINA

2011 JUL 11 PM 4:17

COUNTY OF BEAUFORT

BLOODY POINT PROPERTY
OWNERS' ASSOCIATION, INC.,

Plaintiff,

vs.

WILLIAM A. ASHTON, JR. and
MICHELE C. ASHTON,

Defendants.

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2011-CP-07-

WILLIAM A. ASHTON JR.
120 MARLBROOKWAY
KENNETT SQUARE,
19348

AFFIDAVIT OF SERVICE
SHERIFF'S COSTS

Date 5-24-11

\$ 150 Paid

Receipt No. 442 089

Expiration date: 6-16-11

RECEIVED
SHERIFF'S OFFICE
CHESTER COUNTY, PA.
MAY 23 AM 10:22

5/26

Personally appeared before me, _____, the undersigned deponent, who first being first duly sworn, deposes and says that s/he served a copy of a Civil Action Cover Sheet, Certificate of Exemption from Administrative Order, Lis Pendens, Summons and Complaint on WILLIAM A. ASHTON, JR., a Defendant in the above action by the following method:

- () By delivery to _____ personally at _____ (address), in _____ on the _____ day of _____, 2011.
- () By delivery to _____, a person of suitable age and discretion at the residence of Defendant, leaving with him/her a copy (or copies) of the same at _____ (address), in _____ on the _____ day of _____, 2011.
- () By delivering a copy (or copies) to an agent authorized by appointment or by law to receive service of process _____.

The Deponent is not a party of this action and has no interest therein or connection therewith. Service of Process was made in accordance with applicable statutes and the Rules of Civil Procedure in effect at the time of service.

() MILITARY STATUS: Y N If yes, what branch: _____ Type of ID: _____

Sworn to before me this 14th day of JUNE, 2011.

Elizabeth M. Matthea
Notary Public of Pennsylvania
My Commission Expires: 12/6/2011

Deponent's signature

Attempts ① 5/31 @ 11:32 AM N/A Garage Door Open
Vehicle In Driveway.

② 6/6/11 @ 9:50 AM N/A

③ 6/6 @ 7:08 PM N/A

④ 6/14 @ 11:30 AM N/A

No Answer on 4 Attempts. No Service

Record of Appeal
Page 134

Kurt Hansen 15

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-07-2176

BLOODY POINT PROPERTY)
OWNERS' ASSOCIATION, INC.,)

Plaintiff,)

vs.)

WILLIAM A. ASHTON, JR. and)
MICHELE C. ASHTON,)

Defendants.)

ORDER FOR PUBLICATION

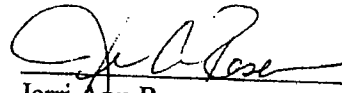
11 JUL 20 AM 11:14
CLERK OF COURT
S.C.

It appearing to my satisfaction from the attached Affidavit for Order of Publication, the attorney for the Plaintiff, Bloody Point Property Owners' Association, Inc., and the Complaint herein, that a cause of action exists in favor of the Plaintiff against Defendants William A. Ashton, Jr. and Michele C. Ashton to foreclose a certain lien on real property, which is more fully described in the Complaint. The whereabouts of Defendants William A. Ashton, Jr. and Michele C. Ashton, are unknown and that said Defendants are necessary parties to the within action.

NOW, THEREFORE, on motion of Julie A. Serafino, Esquire, attorney for the Plaintiff, Bloody Point Property Owners' Association, Inc.,

IT IS ORDERED that the Summons herein, together with notice of the filing thereof in the office of the Clerk of Court for Beaufort County, South Carolina, be served upon the said Defendants by publication of the same in *The Island Packet*, a newspaper published in Beaufort County, State aforesaid, which newspaper is designated most likely to give notice to said Defendants, once a week for three consecutive weeks, and that a copy of the Summons and

Complaint be forwarded to said Defendants by depositing the same in the United States mail,
postage prepaid, addressed to the last known address of said Defendants.

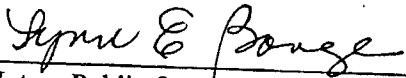


Jerri Ann Roseneau
Clerk of Court of Common Pleas
Beaufort County, South Carolina

July 18, 2011

Beaufort, South Carolina

SWORN TO before me this
18 day of July, 2011.



Notary Public for South Carolina

My Commission Expires: 4/30/17

COPY

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

BLOODY POINT PROPERTY
OWNERS' ASSOCIATION, INC.,)

Plaintiff,)

vs.)

WILLIAM A. ASHTON, JR. and
MICHELE C. ASHTON,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-07-2176

MOTION AND ORDER OF
DEFAULT AND REFERENCE

FILED 28
JUL 28 2011
CLERK OF COURT
BEAUFORT COUNTY, SC

This action is one for foreclosure of a regime lien, for unpaid fees and assessments on specific real property. The Lis Pendens, Summons and Complaint were filed on May 17, 2011. The Defendants are in default.

IT APPEARING that the Defendants William A. Ashton, Jr. and Michele C. Ashton are now in default; and

IT FURTHER APPEARING that pursuant to Rule 53(b), SCRCP as amended, effective September 1, 2002, that this foreclosure is a proper matter to be referred to the Master-in-Equity for Beaufort County, with authority to enter a final judgment in the cause; and,

NOW, upon motion of the attorney for the Plaintiff,

IT IS ORDERED that the Defendants, WILLIAM A. ASHTON, JR. and MICHELE C. ASHTON, are in default and this case is referred to the Honorable Marvin H. Dukes, III, Master-in-Equity for Beaufort County, who, pursuant to Rule 53(c), SCRCP, shall exercise all power and authority which a Circuit Judge sitting without a jury would have, including but not limited to, making findings of fact and conclusions of law; directing entry of final judgment in this action; hearing any

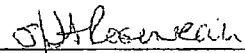
EXHIBIT

tabbies

11

issues, including motions, after sale or judgment; issuing any and all Orders and Supplemental Orders, Writs of Assistance and hearing any issues involving possession and/or removal of property and appraisal proceedings under Section 29-3-360, *et seq.* of the South Carolina Code. Pursuant to Rule 53(e), SCRCF, any appeal from the final judgment entered by the Master-in-Equity shall be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules. Any judicial sale of the property subject of this action may be held on a day other than the regular judicial sale day.

IT IS SO ORDERED!


~~Chief Administrative Judge or Clerk of Court~~
Beaufort County, South Carolina

September 27, 2011
Beaufort, South Carolina

I SO MOVE:

FINGER & FRASER, P.A.

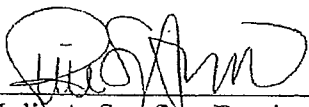

Julie A. Serafino, Esquire
35 Hospital Center Common, Suite 200
Post Office Box 24005
Hilton Head, South Carolina 29925-4005
(843) 681-7000
Attorney for Plaintiff

Exhibit B



**SUMMARY APPRAISAL REPORT OF
THE PROPERTY LOCATED AT**

42 Fuskie Lane

Daufuskie Island, SC 29915

as of

April 2, 2012

for

Client: William A Ashton Jr MD & Michele C Ashton
120 Marlbrooke Way
Kennett Square, PA
19348

by

Accent Appraisals, Inc.

PO Box 5185
Hilton Head Island, SC 29938

Complete Appraisal Analysis - Summary Appraisal Report

LAND APPRAISAL REPORT

File No. 11513212.ACC

IDENTIFICATION	Borrower <u>N/A</u>		Census Tract <u>21.01</u>		Map Reference <u>800-027-A-0055</u>			
	Property Address <u>42 Fuskie Lane</u>							
	City <u>Daufuskie Island</u>		County <u>Beaufort</u>		State <u>SC</u> Zip Code <u>29915</u>			
	Legal Description <u>Lot 55 Daufuskie Island Club PH 1 PB 37 P12</u>							
NEIGHBORHOOD	Sale Price <u>\$N/A</u>		Date of Sale <u>N/A</u>		Loan Term <u>N/A</u> yrs.			
	Actual Real Estate Taxes <u>\$1670/2011</u>		(yr.)		Loan charges to be paid by seller <u>\$N/A</u>			
	Lender/Client <u>Client: William A Ashton Jr MD & Michele C Ashton</u>		Address <u>120 Marlbrooke Way, Kennett Square, PA, 19348</u>					
	Occupant <u>Unimproved Site</u>		Appraiser <u>Berendina E. Page</u>		Instructions to Appraiser <u>Estimate Market Value</u>			
	Location		☐ Urban ☒ Suburban ☐ Rural					
	Built Up		☐ Over 75% ☒ 25% to 75% ☐ Under 25%					
	Growth Rate		☐ Fully Dev. ☐ Rapid ☐ Steady ☒ Slow					
	Property Values		☐ Increasing ☐ Stable ☒ Declining					
	Demand/Supply		☐ Shortage ☐ In Balance ☒ Over Supply					
	Marketing Time		☐ Under 3 Mos. ☐ 4-6 Mos. ☒ Over 6 Mos.					
SITE	Present Land Use <u>40 % 1 Family</u>		<u>% 2-4 Fam</u>		<u>% Apts. 1 % Condo 1 % Commercial</u>			
	<u>% Industrial</u>		<u>% Vacant 58 %</u>		<u>Recreational & Unimproved</u>			
	Change in Present Land Use		☐ Not Likely ☒ Likely (*)		☐ Taking Place (*)			
	Predominant Occupancy		☒ Owner ☐ Tenant		☐ Vacant			
	Single Family Price Range		<u>\$ 40</u> to <u>\$ 2+ Mil.</u>		Predominant Value <u>\$ 400,000</u>			
	Single Family Age		<u>New</u> yrs. to <u>80</u> yrs.		Predominant Age <u>20-24</u> yrs.			
	Employment Stability		☐ Good ☐ Avg. ☒ Fair ☐ Poor					
	Convenience to Employment		☐ Good ☐ Avg. ☒ Fair ☐ Poor					
	Convenience to Shopping		☐ Good ☐ Avg. ☒ Fair ☐ Poor					
	Convenience to Schools		☐ Good ☐ Avg. ☒ Fair ☐ Poor					
MARKET DATA ANALYSIS	Comments including those factors, favorable or unfavorable, affecting marketability (e.g. public parks, schools, noise) <u>Daufuskie Island is developed as an upscale, secluded, exclusive golf and country club retreat featuring 2 private & gated residential subdivisions - Haig Point and Melrose Plantation. Additional subdivisions are Bloody Point, Oakridge. Development on Daufuskie Island began in 1985+. *** See Additional Comments ***</u>							
	Dimensions <u>Per attached Plat</u> = <u>23,104 Sft/0.53 Ac</u> ☐ Corner Lot							
	Zoning Classification <u>PUD - Planned Development</u> Present Improvements ☒ do ☐ do not conform to zoning regulations							
	Highest and best use: ☐ Present use ☒ Other (specify) <u>Improve with a Single Family Residence</u>							
	Public ☒ Other (Describe) <u>LPTnl/Typical</u>		OFF SITE IMPROVEMENTS		Topo <u>Generally Level</u>			
	Elec. ☒		Street Access: ☐ Public ☒ Private		Size <u>0.53 Acres</u>			
	Gas ☐		Surface <u>Asphalt/Comm Mutnd</u>		Shape <u>Rectangular</u>			
	Water ☒		Maintenance: ☐ Public ☒ Private		View <u>Golf & 2nd Rwy Ocean</u>			
	San. Sewer ☒		☐ Storm Sewer ☐ Curb/Gutter		Drainage <u>Appears Adequate - sloping to road</u>			
	☐ Sidewalk ☐ Street Lights		Is the property located in a HUD Identified Special Flood Hazard Area? ☐ No ☒ Yes					
RECONCILIATION	Comments (favorable or unfavorable including any apparent adverse easements, encroachments or other adverse conditions) <u>There are no adverse easements or encroachments known or made known which negatively affect the subject's value. Typical building setbacks Flood panel 450025 0138D - Zone A7 dated 09/29/86. When improved flood insurance will be required. No adverse effect on value nor marketability.</u>							
	The undersigned has recited three recent sales of properties most similar and proximate to subject and has considered these in the market analysis. The description includes a dollar adjustment, reflecting market reaction to those items of significant variation between the subject and comparable properties. If a significant item in the comparable property is superior to, or more favorable than, the subject property, a minus (-) adjustment is made, thus reducing the indicated value of subject; If a significant item in the comparable is inferior to, or less favorable than, the subject property, a plus (+) adjustment is made, thus increasing the indicated value of the subject.							
	ITEM	Subject Property	COMPARABLE NO. 1		COMPARABLE NO. 2		COMPARABLE NO. 3	
	Address	<u>42 Fuskie Lane</u> <u>Lot 55 Bloody Point</u>	<u>83 Fuskie Ln</u> <u>Lot 31 Bloody Point</u>		<u>91 Fuskie Lane</u> <u>Lot 35 Bloody Point</u>		<u>110 Martinangel Ln</u> <u>Lot 1 Melrose</u>	
	Proximity to Subj.		<u>0.42 miles SW</u>		<u>0.49 miles SW</u>		<u>1.66 miles NE</u>	
	Sales Price	<u>\$ N/A</u>	<u>\$ 360,000</u>		<u>\$ 363,400</u>		<u>\$ 315,000</u>	
	Price	<u>\$ N/A</u>	<u>\$ N/A</u>		<u>\$</u>		<u>\$ N/A</u>	
	Data Source	<u>CntyRcds/Insp./MLS</u>	<u>MLS#310904@\$450,000 CntyRcds</u>		<u>MLS#305666@\$599,000 CntyRcds</u>		<u>MLS#30986@\$399,000 CntyRcds</u>	
	Date of Sale and Time Adjustment	<u>Insp. 04/02/2012</u>	<u>10/23/2011</u>		<u>06/13/2011</u>		<u>11/14/2011</u>	
	Location	<u>BloodyPoint/Daufuskie</u>	<u>BloodyPoint/Daufuskie</u>		<u>BloodyPoint/Daufuskie</u>		<u>Melrose/Daufuskie</u>	
Site View	<u>Golf/2nd Row Ocean</u>	<u>Ocean Front</u>		<u>Ocean Front</u>		<u>Golf/Ocean Front</u>		
Site Area	<u>0.53 AC</u>	<u>2.01 Act-</u>		<u>1.74 Act-</u>		<u>0.78 Act-</u>		
Sqft/Acre	<u>23,104 Sqft</u>	<u>87,556 Sqft+</u>		<u>75,794 Sqft+</u>		<u>33,845 Sqft+</u>		
\$/Sqft	<u>N/A</u>	<u>\$4.11/Sqft</u>		<u>\$4.80 Sqft</u>		<u>9.31/Sqft</u>		
DaysOnMarket	<u>N/A</u>	<u>25 Days/REO Prop</u>		<u>101 Days/REO Prop</u>		<u>3.5 Mo ShortSale</u>		
Sales or Financing Concessions	<u>N/A</u>	<u>Reo10/03/11@360,000</u>		<u>Reo10/04/10@590,750</u>		<u>Prior Sale</u>		
Net Adj. (Total)		<u>06/11/08@1,200,000</u>		<u>11/03/04@289,508</u>		<u>08/04/05@\$1,000,000</u>		
Indicated Value of Subject		<u>Gross 0.0%</u> <u>Net 0.0%</u>		<u>Gross 0.0%</u> <u>Net 0.0%</u>		<u>Gross 0.0%</u> <u>Net 0.0%</u>		
Comments on Market Data: <u>SEE ADDED COMPARABLES 4,5,6,7,8&9. AND THE ADDITIONAL COMMENTS ADDENDUM.</u>								
Comments and Conditions of Appraisal: <u>This appraisal is made on an unimproved residential building site lot 55 Daufuskie Island Club ph 1- Bloody Point - Daufuskie Island, SC</u>								
Final Reconciliation: <u>The Market Data Approach best supports the final conclusion of value as it represents the actions of buyers and sellers in the market place. See addition comments addendum -Market data.</u>								
I ESTIMATE THE MARKET VALUE OF SUBJECT PROPERTY AS OF <u>April 2</u> , 2012 to be \$ <u>140,000</u>								
Appraiser(s)		Review Appraiser (if applicable) ☐ Did ☐ Did Not Physically Inspect Property						
Signature		Signature						
Name <u>Berendina E. Page</u>		Name						
Date <u>04/15/2012</u>		Date						
State <u>SC</u>		License ☒ Certification # <u>2571</u>						

N/A

42 Fuskie Lane

County Beaufort

State SC

29915

Client: William A Ashton Jr MD & Michele C Ashton

ITEM	Subject Property	COMPARABLE NO. 4		COMPARABLE NO. 5		COMPARABLE NO. 6	
Address	42 Fuskie Lane Lot 55 Bloody Point	70 Fuskie Lane Lot 45 Bloody Point		24 Fuskie Lane Lot 64 Bloody Point		4 Fuskie Lane Lot 74 Bloody Point	
Proximity to Subj.		0.31 miles SW		0.17 miles NE		0.38 miles NE	
Sales Price	\$ N/A		\$ 149,000		\$ 249,000		\$ 199,000
Price	\$ N/A		\$ N/A		\$ N/A		\$ N/A
Data Source	CntyRcds/Insp./MLS	MLS#305492/County Rcds		MLS#315052/County Rcds		MLS#303034/County Rcds	
Date of Sale and Time Adjustment	DESCRIPTION Insp. 04/02/2012	DESCRIPTION LIST/AvgNego28%	+(-)\$ Adjustment -42,000	DESCRIPTION LIST/AvgNego28%	+(-)\$ Adjustment -70,000	DESCRIPTION LIST/AvgNego28%	+(-)\$ Adjustment -56,000
Location	BloodyPoint/Daufuskie	BloodyPoint/Daufuskie		BloodyPoint/Daufuskie		BloodyPoint/Daufuskie	
Site/View	Golf/2nd Row Ocean	Mrsh/Glf/2nd RWOcn		Golf/2nd Row Ocean		LgnGlf/2nd RWOcn	
Site Area	0.53 AC	0.63 Act-		0.53 Act-		0.53 Act-	
Sqft/Acre	23,104 Sqft	27,443 Sqft+-		23,086 Sqft+-		23,086 Sqft+-	
\$\$/Sqft	N/A	\$5.43/ Sqft		\$10.79/ Sqft		\$8.62/ Sqft	
DaysOnMarket	N/A	LD 12/06/10/481Days		LD 04/12/12		LD 08/02/10/605Days	
Sales or Financing Concessions	N/A	Prior Sale 03/26/05 @220,000		Prior Sale 09/24/01@190,000		Prior Sale 12/26/01@130,000	
Net Adj. (Total)		Plus X Minus \$ -42,000		Plus X Minus \$ -70,000		Plus X Minus \$ -56,000	
Indicated Value of Subject		Gross 28.2% Net -28.2% \$ 107,000		Gross 28.1% Net -28.1% \$ 179,000		Gross 28.1% Net -28.1% \$ 143,000	

Comments on Market Data Analysis In addition to comps 4,5, & 6 MLS# 234192 Lot 57 Bloody Point -38 Fuskie Lane Mailing 0.53 Acres site is listed as of 11/13/2006 at \$625,000-. List price for this site has not been adjusted over time to reflect market behavior. It sold prior on 03/25/1999 at \$95,000

The most recent market sale for the subject property is on 06/06/2001 at \$201,500 and on 12/09/1999 at \$110,000. Comparable 4 sold prior 03/026/05 at \$220,000 and on 10/09/00 at \$149,000. Prior sale comp. 5 is on 09/24/01 @\$190,000. Prior sale comp 6 is on 12/06/01 @\$130,000

ADDITIONAL COMPARABLES

Borrower/Client N/A									
Property Address 42 Fuskie Lane									
City Daufuskie Island County Beaufort State SC Zip Code 29915									
Lender Client: William A Ashton Jr MD & Michele C Ashton									
MARKET DATA ANALYSIS	ITEM	Subject Property	COMPARABLE NO. 7		COMPARABLE NO. 8		COMPARABLE NO. 9		
	Address	42 Fuskie Lane Lot 55 Bloody Point	29 River Rd Lot 89 Bloody Point		86 Fuskie Lane Lot 109 Bloody Point		97 Fuskie Lane Lot 106 Bloody Point		
	Proximity to Subj.		0.47 miles NW		0.45 miles SW		0.55 miles SW		
	Sales Price	\$ N/A	\$ 129,000		\$ 259,900		\$ 499,000		
	Price	\$ N/A	\$ N/A		\$ N/A		\$ N/A		
	Date Source	CntyReds/Insp./MLS	MLS#314817/County Recds		MLS#314973/County Recds		MLS#309617/County Recds		
	Date of Sale and Time Adjustment	DESCRIPTION	DESCRIPTION	+ (-) \$ Adjustment	DESCRIPTION	+ (-) \$ Adjustment	DESCRIPTION	+ (-) \$ Adjustment	
		Insp. 04/02/2012	LIST/AvgNego28%	-36,000	LIST/AvgNego28%	-73,000	LIST/AvgNego28%	-140,000	
	Location	BloodyPoint/Daufuskie	BloodyPoint/Daufuskie		BloodyPoint/Daufuskie		BloodyPoint/Daufuskie		
	Site/View	Golf/2nd Row Ocean	Golf/OceanOrnt	Inferior	Marsh/2nd Row Ocean		River/Ocean	Superior	
	Site Area	0.53 AC	0.52 Act-		0.92 Act-	Superior	1.14 Act-	Superior	
	Sqft/Acre	23,104 Sqft	22,651 Sqft+		40,075 Sqft+	Superior	49,658 Sqft+	Superior	
	\$/Sqft	N/A	\$5.70/ Sqft		\$6.49/ Sqft/Listprice		\$10.05/ Sqft/Listprice		
	DaysOnMarket	N/A	LD 04/01/12/ 1 day		LD 04/06/12		LD 06/27/11/245Days		
	Sales or Financing Concessions	N/A	Prior Sale		Prior Sale		Prior Sale		
Net Adj (Total)		04/26/05 @129,000		09/15/03@250,000		07/07/05@725,000			
Indicated Value of Subject		Plus ☒ Minus ☐	\$ -36,000	Plus ☒ Minus ☐	\$ -73,000	Plus ☒ Minus ☐	\$ -140,000		
		Gross 27.9%		Gross 28.1%		Gross 28.1%			
		Net -27.9%	\$ 93,000	Net -28.1%	\$ 186,900	Net -28.1%	\$ 359,000		
Comments on Market Data Analysis The only prior sale for comp. 7 is on 04/26/05 at \$129,000. Comparable 8 sold prior on 09/15/03 @ \$250,000 and on 09/29/00 at \$295,000, on 06/13/00 it sold at \$170,000 (seller Melrose Co) On 06/05/00 it appears Mr. & Mrs. Milward sold lot 109 to the MelroseCo at @\$325,000 Comparable 9 sold prior 07/07/05 @\$725,000. It is listed at \$499,000 or at 31%+ below purchase price.									
MLS#301758 is an expired listing on 03/23/2012 of lot 85 Bloody Point (21 River Rd) 0.50 Ac site listed at \$85,000, reduced from \$95,000 when it was first listed on 06/07/2010. It sold prior on 12/20/2007 at \$145,000 and on 06/22/05 at \$150,000									
Comparable 9 is added only because of the lack of recent sales. Comp. 9 and expired listing lot 85 appear good indicators of market conditions/value trend.									

ADDITIONAL COMMENTS

Borrower or Owner N/A

Property Address 42 Fuskie Lane

City Daufuskie Island

County Beaufort

State SC

Zip Code 29915

Lender or Client Client: William A Ashton Jr MD & Michele C Ashton

Neighborhood

Daufuskie Island is developed as an upscale, secluded, exclusive golf and country club retreat featuring 2 private & gated residential subdivisions - Haig Point and Melrose Plantation known as The Daufuskie Island Club & Resort. Development of Daufuskie Island began in 1985. In addition to the 2 gated residential communities, plotted development progressed with Bloody Point, Maryfield, Indian Springs, Governors, Oakridge & Beachfield S/D. Historical Daufuskie, is the home of mostly Daufuskie natives.

Bloody Point is founded in 1991 and covers 350 acres. It features 110 plotted homesites combined along Fuskie Lane and River Road. Approximately 15 sites are improved with a single family residence. 1 Fuskie Lane features Sandy Lane Villas a 32 unit Ocean Front Condominium complex.

Daufuskie Island is a small barrier ferry served island. Recent population numbers are approx 400 permanent residents and the same as part time residents. The few paved roads on the island are mainly within the residential subdivisions. Most roads outside the subdivisions - "plantations", are dirt/sand roads.

Transportation on the island is primarily electric/gas golf cart although some automobiles/trucks are on the island.

Besides the Haig Point ferry to Hilton Head Island, which services mostly it's members and their guests, ferry services are extremely limited with as little as 2 round trips daily and none on Sunday's (current round trip fee is \$28.00 per person with children under 2 are free).

The limited ferry services is a result of the Bankruptcy of all the assets of the Daufuskie Island resort, & Breathe Spa (a.k.a Melrose) in January 2009.

Assets of the resort include: the Inn, two golf courses (Melrose and Bloody Point), tennis courts, several restaurants, beach club, an equestrian center, entitlements to develop more than 500 commercial and residential parcels.

Mr. Robert C. Onorato became the Appointed Trustee for Daufuskie Island Properties, Inc Chapter 11 Bankruptcy

The Bloody Point S/D sold at auction in 06/2011 to Brian McCarthy. Under new ownership, the golf course is currently under rehabilitation by Love Design Group. (see additional pictures subject property). The Club House Restaurant, "The Eagles Nest" has reopened. "Permits have been issued for the community dock to be built behind the 17th green on the Mungen River, to provide limited ferry service to and from Savannah, Ga. The former "Spa" Building is being renovated into a facility with 7 bedrooms for owners and golfers to stay" data 01/12/2012. Bloody Point Property Owners Newsletter, by Tony Simonelli, President Bloody Point POA.

As a result the the chapter 11 bankruptcy and the economic downturn, property values have steadily declined with the number of available Short Sale and REO properties increasing, whilst demand is trailing supply.

MARKET CONDITIONS DAUFUSKIE ISLAND - BLOODY POINT.

DAUFUSKIE ISLAND:

169 residential; building sites are listed in a list price range \$1. - \$1,399,000
\$1.00 site is located in Haig Point. It requires Club Membership valued at \$65,000.
In addition a 194.25 acre undeveloped tract is listed at \$3,900,000.

27 sites sold in the past 12 months ranging \$1.-\$425,000

6 sites are current contracted scheduled to close in a list price range \$17,500-\$399,000.

BLOODY POINT:

Of the 169 residential sites listed, 11 are located in Bloody Point in a list price range \$129,000-\$1,399,000 (see attached map Bloody Point S.D)

Of the 27 sales, 2 Bloody Point sites sold on the past 12 months. -Both are REO Properties (See comparables 1&2)

Lot 31 at \$350,000 - MLS#310904

Lot 35 at \$363,300 - MLS#305666

1 Bloody Point site sold in the previous 12 mo period 04/10-04/11

(MLS#255287 Lot 25 a short Sale at \$699,000 on 07/16/2010.

Sandy Lane Condominiums:

4 Units are currently listed in a list price range \$550,000-\$650,000 (Unit 1403 is a short sale listing at \$650,000- None are REO Property Listings)

2 units sold in the past 12 months both are REO properties selling cash at \$360,000 unit 2204 and \$340,000 unit 1203
Unit 1104 is the only sale in the previous 12 mo period 4/2010-4/2011 an REO Property it sold Cash 06/23/2010 @ \$350,000.

34 homes are listed on Daufuskie Island in a listed price range \$99,000-\$1,995,000

16 sold in the past 12 months in price range \$39,900-\$823,000.

5 homes are under contract scheduled to close in a list price range \$229,00-\$229,000

in addition 1 is a contingent- subject to listing, listed at \$599,000

Of the 34 homes listed 1 is located within Bloody Point MLS# 314119 lot 13 - 35 Fuskie Lane at \$1,995,000.

No homes sold in the past 12 month period. None sold in the previous 12 mo period 04/2010-04/2011.

Data is per MLSofHHI

NEIGHBORHOOD: FAIR RATING a result of the bankruptcy and current economics. Poor Transportation rating reflects Limited Ferry Services. Recreational facilities at present are fair.

Year 2012 Bloody Point HOA dues are \$1,150 for the year. (per GW services)

ADDITIONAL COMMENTS
Page 2

Borrower or Owner	N/A				
Property Address	42 Fuskie Lane				
City	Daufuskie Island	County	Beaufort	State	SC
				Zip Code	29915
Lender or Client	Client: William A Ashton Jr MD& Michele C Ashton				

Comments on Market Data

Disclosure: I certify, as the appraiser, that I have NOT appraised, or provided a previous service regarding the subject property in the past 36 months prior to this assignment and that I have no current or prospective interest in the subject property or parties involved.

I certify, as the appraiser, that I have complied with the Home Valuation Code of Conduct in all aspects of the appraisal process.

Scope of work: Provide an opinion of market value as of the effective date of this report 04/02/2012.

Intended use is to rebut the 01/06/2012 sale and sales price of the subject property at \$8,800 recorded book 3111/page 1291

Intended user(s): Dr. & Mrs. William Ashton Jr. and their legal representatives.

NO other use and users are identified, nor intended by the appraiser.

The subject property is located in Bloody Point S/D on Daufuskie Island, SC. It is an unimproved residential building site known as lot 55 Daufuskie Island Club Phase 1. Property ID R800 027 00A 0055 0000, Key # 01824887

Due to the lack of recent sales comparable to subject property and located within Bloody Point S/D, 9 Comparables are utilized in this report. Comps. 1, 2 and 3 are closed sales comparables. Although all 3 closed sales comparables have a superior valued ocean front location, they are considered good indicators of the Bloody Point - Melrose market conditions.

Comp. 1 & 2 are REO property sales located in Bloody Point. Sale 2 is a short sale property sale located in Melrose S/D.

Because none of the 3 sales are arms length transactions, No adjustment is established to the comparables pertaining to the superior valued site/view @\$/sqft. Instead listing comparables 4, 5, 6, 7, 8 & 9 are added. All listing comparables are adjusted for negotiation at 28% based on the list to sale price comparables for 4, 5 and 6.

Comps 4, 5 & 6 are considered the best indicators of value for the subject property, with added consideration of comparables 7, 8 resp. Comp. 9 is given least consideration.

The best indication of value for the subject property is provided from within Bloody Point S/D. With Melrose Plantation also selling a bankruptcy sale in 2011 it's market conditions are most similar to Bloody Point. Sales/listings from within Haig Point-a gated golfing community are not considered comparable. They include mandatory club membership valued at \$65,000+-. Other developing Daufuskie S.D & Historical Daufuskie are no golfing communities and are not comparable.

With the limited available sales data, the comparables utilized here are the best indicators of value for the subject property at this time.

State of South Carolina Real Estate Appraisers Board

BERENDINA E. PAGE

CR 2571

Having Satisfied The Qualifications Of The South Carolina Real Estate Appraisers Board And Having Complied
With The Requirements Prescribed By Law, Is Hereby Entitled To Practice As A
Certified Residential Appraiser

In Witness Whereof The State Of South Carolina Real Estate Appraiser Board By Virtue Of The Authority
Vested In It By Chapter 60, Title 40 Code of Laws Of South Carolina Has Caused This Document To Be
Issued With Its Seal Imprinted Hereon.

Property of South Carolina Real Estate Appraisers Board


Administrator

State of South Carolina
Department of Labor, Licensing and Regulation
Real Estate Appraisers Board

BERENDINA E. PAGE

Is hereby entitled in practice as a:

Certified Residential Appraiser

License Number: 2571

Expiration Date: 06/30/2011

OFFICE COPY

State of South Carolina
Department of Labor, Licensing and Regulation
Real Estate Appraisers Board

BERENDINA E. PAGE

Is hereby entitled in practice as a:

Certified Residential Appraiser

License Number: 2571

Expiration Date: 06/30/2011

POCKET CARD

SITE PLAN

Borrower or Owner N/A

Property Address 42 Fuskie Lane

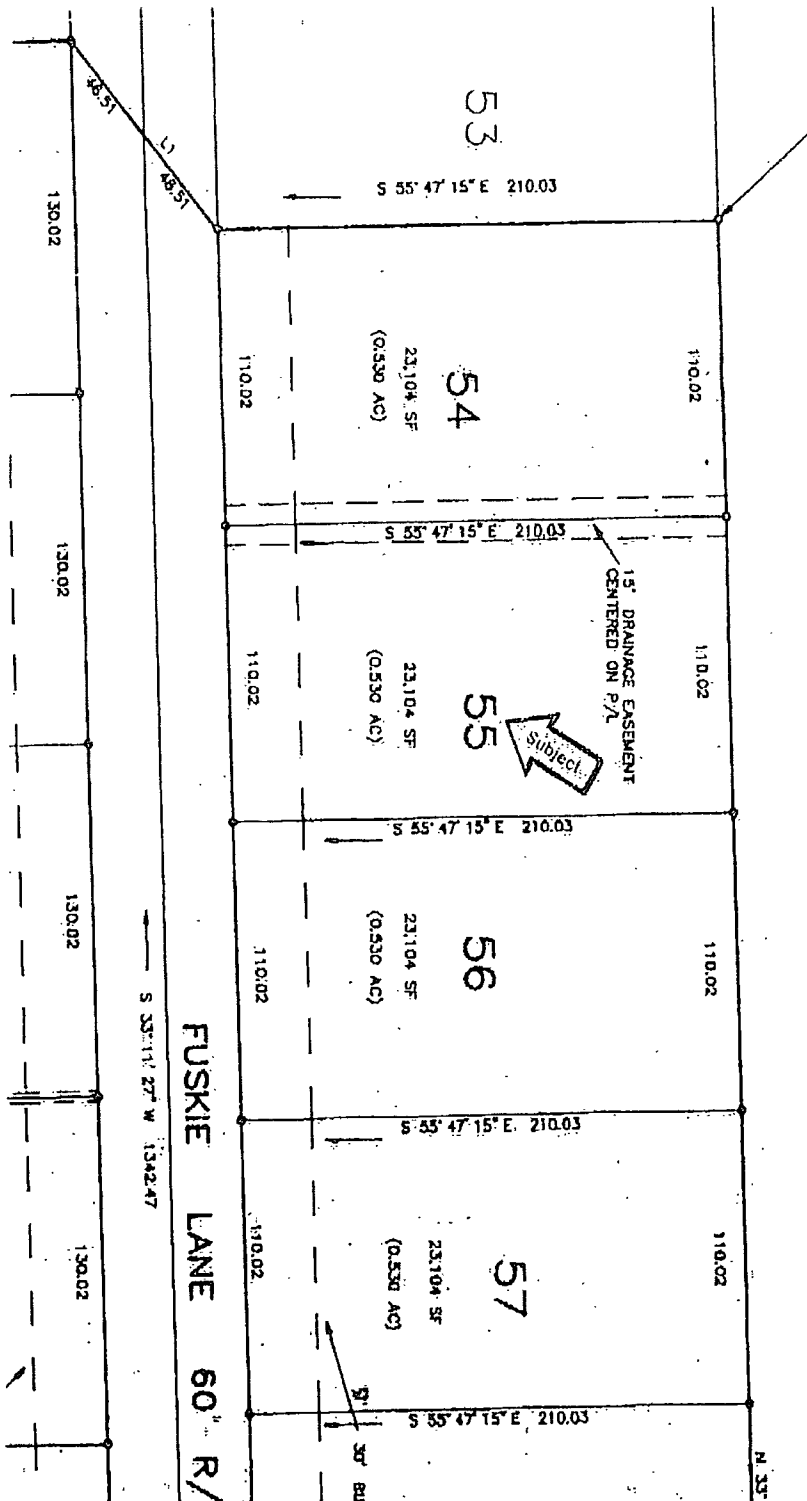
City Daufuskie Island

County Beaufort

State SC

Zip Code 29915

Client Client: William A Ashton Jr MD & Michele C Ashton



PHOTOGRAPH ADDENDUM

Borrower or Owner N/A

Property Address 42 Fuskie Lane

City Daufuskie Island

County Beaufort

State SC

Zip Code 29915

Client William A Ashton Jr MD & Michele C Ashton

FRONT VIEW OF
SUBJECT PROPERTYREAR VIEW OF
SUBJECT PROPERTYSTREET SCENE OF
SUBJECT PROPERTY

PHOTOGRAPH ADDENDUM

Borrower or Owner N/A

Property Address 42 Fuskie Lane

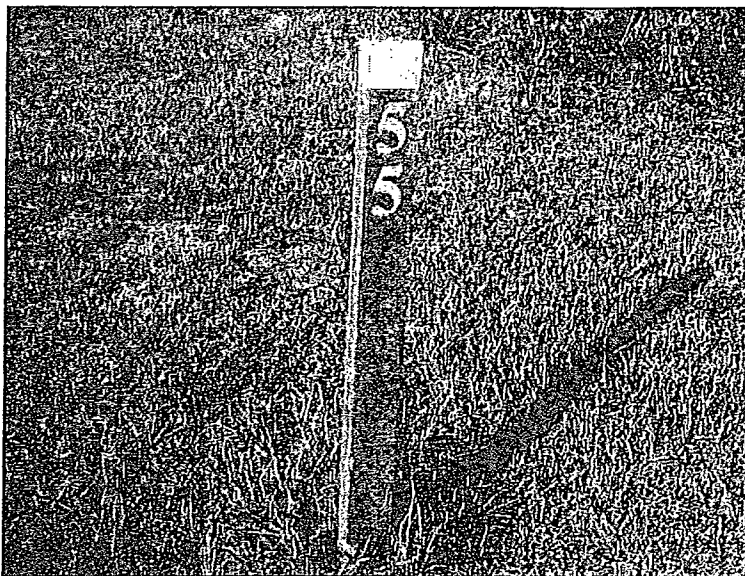
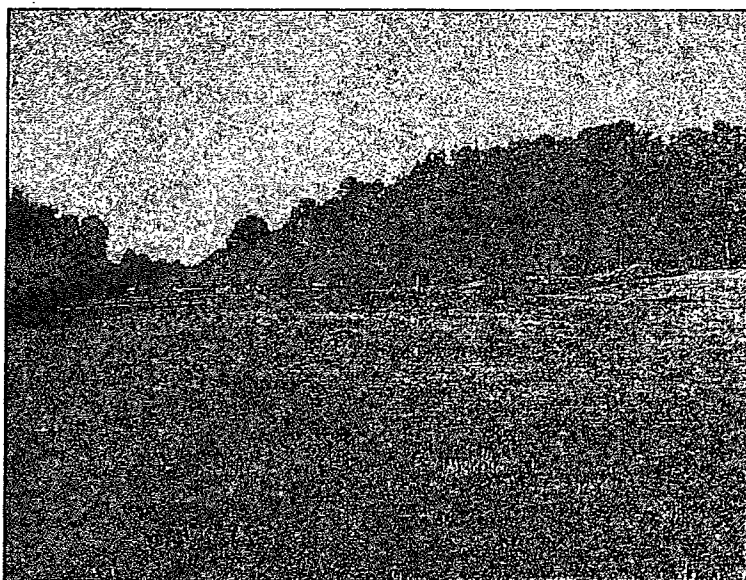
City Daufuskie Island

County Beaufort

State SC

Zip Code 29915

Client Client: William A Ashton Jr MD & Michele C Ashton

42 Fuskie Lane
SITE MARKER42 Fuskie Lane
GOLF COURSE PICT 142 Fuskie Lane
GOLF COURSE PICT 2

LOCATION MAP

Borrower or Owner N/A

Property Address 42 Fuskie Lane

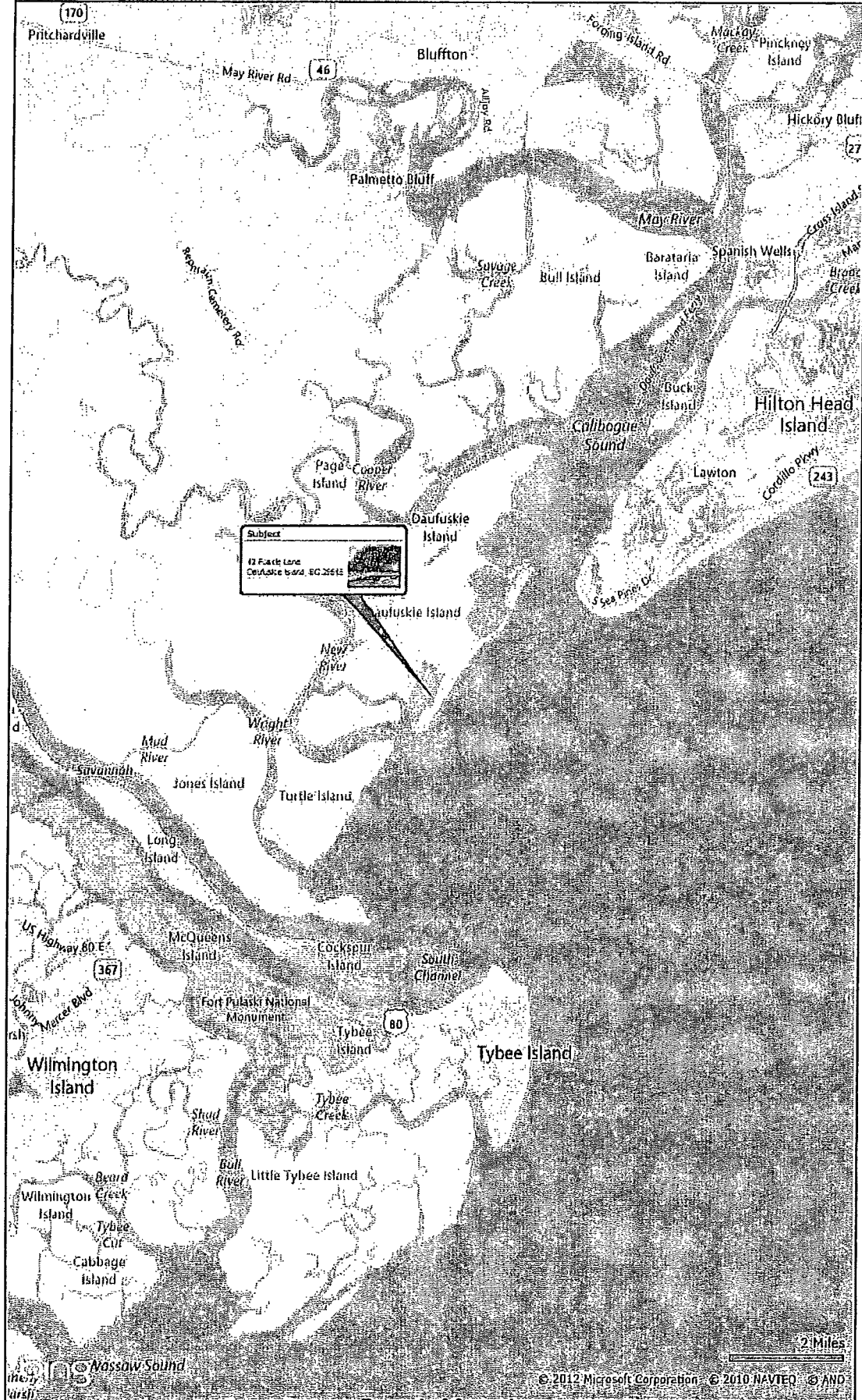
City Daufuskie Island

County Beaufort

State SC

Zip Code 29915

Client Client: William A. Ashton Jr MD & Michele C. Ashton



General Map 1

Borrower or Owner N/A

Property Address 42 Fuskie Lane

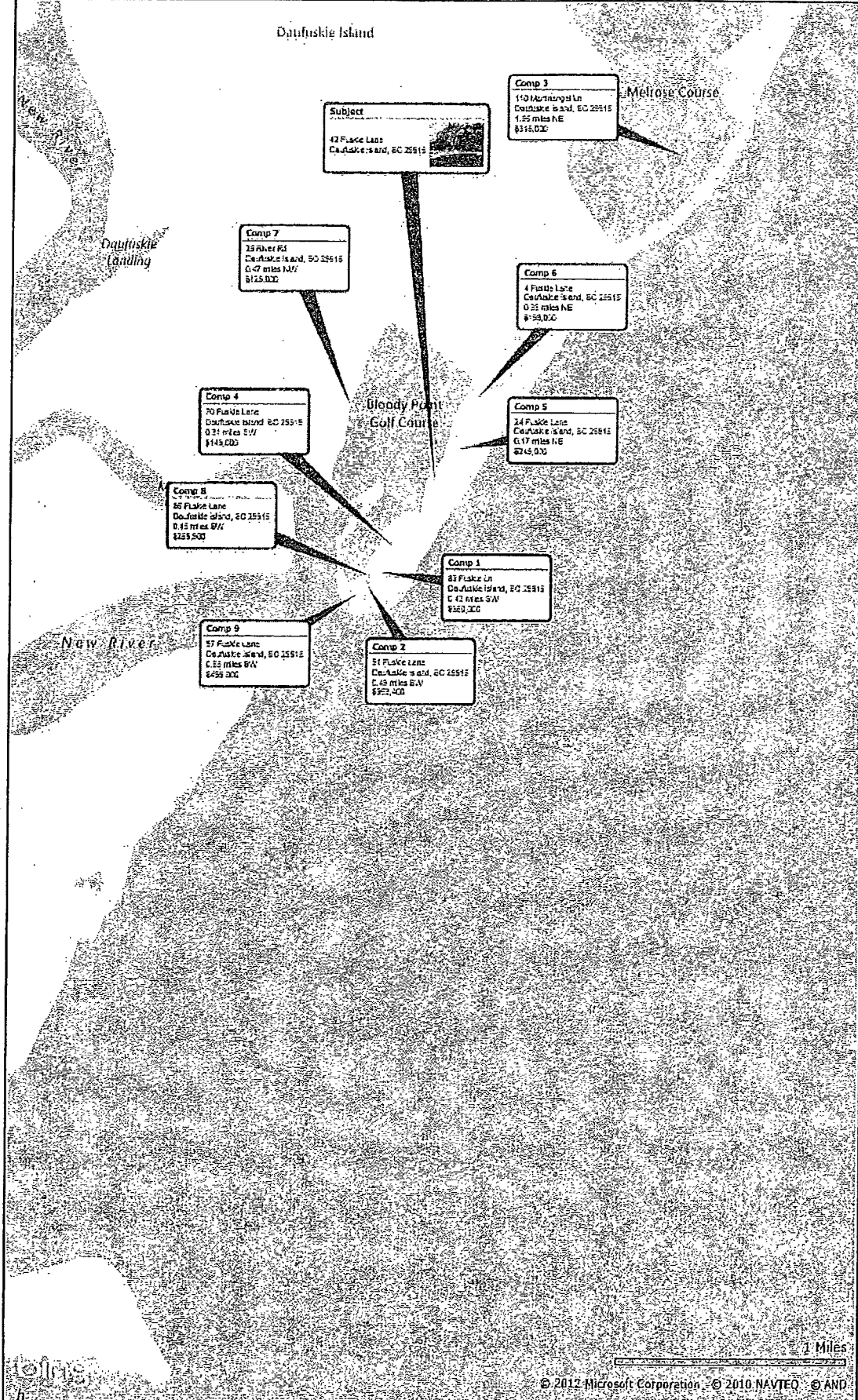
City Daufuskie Island

County Beaufort

State SC

Zip Code 29915

Client Client: William A Ashton Jr MD & Michele C Ashton



General Map 2

Borrower or Owner N/A

Property Address 42 Fuskie Lane

City Daufuskie Island

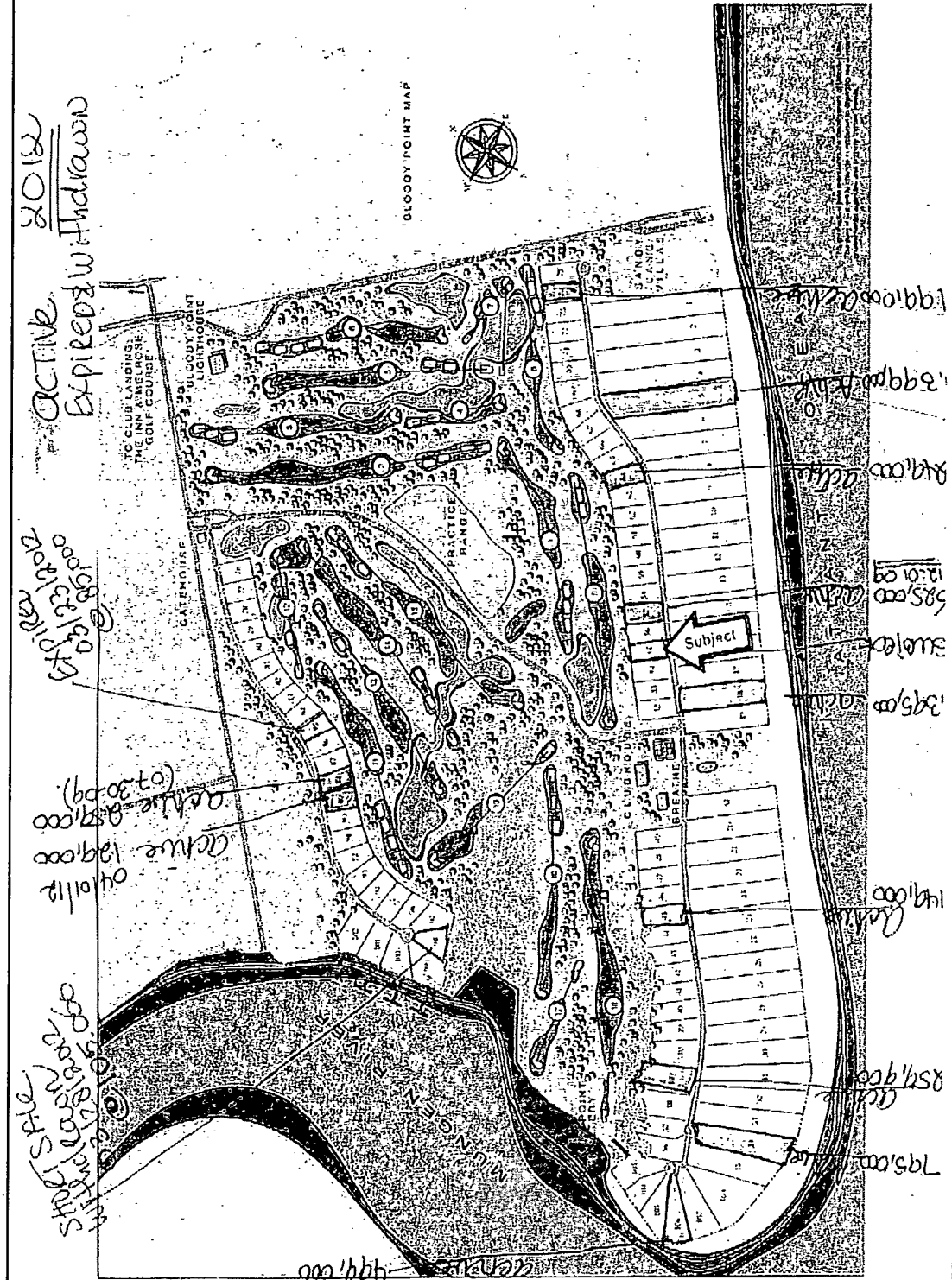
County Beaufort

State SC

Zip Code 29915

Client Client: William A Ashton Jr MD & Michele C Ashton





ACTIVE 2012
Expired with Drawn

[illegible]

04/11/12
active 129,000
active 827,000
(07/30/09)

12/10/2000

Subject

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1001678

100

plane

34500

1

006'bsx

795,000'sbL



Borrower or Owner	N/A
Property Address	42 Fuskil

File No. 11513212.ACC

DEFINITION OF MARKET VALUE: The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby: (1) buyer and seller are typically motivated; (2) both parties are well informed or well advised, and each acting in what he considers his own best interest; (3) a reasonable time is allowed for exposure in the open market; (4) payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and (5) the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions* granted by anyone associated with the sale.

*Adjustments to the comparables must be made for special or creative financing or sales concessions. No adjustments are necessary for those costs which are normally paid by sellers as a result of tradition or law in a market area; these costs are readily identifiable since the seller pays these costs in virtually all sales transactions. Special or creative financing adjustments can be made to the comparable property by comparisons to financing terms offered by a third party institutional lender that is not already involved in the property or transaction. Any adjustment should not be calculated on a mechanical dollar for dollar cost of the financing or concessions but the dollar amount of any adjustment should approximate the market's reaction to the financing or concessions based on the appraiser's judgment.

STATEMENT OF LIMITING CONDITIONS AND APPRAISER'S CERTIFICATION

CONTINGENT AND LIMITING CONDITIONS: The appraiser's certification that appears in the appraisal report is subject to the following conditions:

1. The appraiser will not be responsible for matters of a legal nature that affect either the property being appraised or the title to it. The appraiser assumes that the title is good and marketable and, therefore, will not render any opinions about the title. The property is appraised on the basis of it being under responsible ownership.
2. The appraiser has provided a sketch in the appraisal report to show approximate dimensions of the improvements and the sketch is included only to assist the reader of the report in visualizing the property and understanding the appraiser's determination of its size.
3. The appraiser has examined the available flood maps that are provided by the Federal Emergency Management Agency (or other data sources) and has noted in the appraisal report whether the subject site is located in an identified Special Flood Hazard Area. Because the appraiser is not a surveyor, he or she makes no guarantees, express or implied, regarding this determination.
4. The appraiser will not give testimony or appear in court because he or she made an appraisal of the property in question, unless specific arrangements to do so have been made beforehand.
5. The appraiser has estimated the value of the land in the cost approach at its highest and best use and the improvements at their contributory value. The separate valuations of the land and improvements must not be used in conjunction with any other appraisal and are invalid if they are so used.
6. The appraiser has noted in the appraisal report any adverse conditions (such as, needed repairs, depreciation, the presence of hazardous wastes, toxic substances, etc.) observed during the inspection of the subject property or that he or she became aware of during the normal research involved in performing the appraisal. Unless otherwise stated in the appraisal report, the appraiser has no knowledge of any hidden or unapparent conditions of the property or adverse environmental conditions (including the presence of hazardous wastes, toxic substances, etc.) that would make the property more or less valuable, and has assumed that there are no such conditions and makes no guarantees or warranties, express or implied, regarding the condition of the property. The appraiser will not be responsible for any such conditions that do exist or for any engineering or testing that might be required to discover whether such conditions exist. Because the appraiser is not an expert in the field of environmental hazards, the appraisal report must not be considered as an environmental assessment of the property.
7. The appraiser obtained the information, estimates, and opinions that were expressed in the appraisal report from sources that he or she considers to be reliable and believes them to be true and correct. The appraiser does not assume responsibility for the accuracy of such items that were furnished by other parties.
8. The appraiser will not disclose the contents of the appraisal report except as provided for in the Uniform Standards of Professional Appraisal Practice.
9. The appraiser has based his or her appraisal report and valuation conclusion for an appraisal that is subject to satisfactory completion, repairs, or alterations on the assumption that completion of the improvements will be performed in a workmanlike manner.
10. The appraiser must provide his or her prior written consent before the lender/client specified in the appraisal report can distribute the appraisal report (including conclusions about the property value, the appraiser's identity and professional designations, and references to any professional appraisal organizations or the firm with which the appraiser is associated) to anyone other than the borrower; the mortgagee or its successors and assigns; the mortgage insurer; consultants; professional appraisal organizations; any state or federally approved financial institution; or any department, agency, or instrumentality of the United States or any state or the District of Columbia; except that the lender/client may distribute the property description section of the report only to data collection or reporting service(s) without having to obtain the appraiser's prior written consent. The appraiser's written consent and approval must also be obtained before the appraisal can be conveyed by anyone to the public through advertising, public relations, news, sales, or other media.

APPRAISER'S CERTIFICATION: The Appraiser certifies and agrees that:

1. I have researched the subject market area and have selected a minimum of three recent sales of properties most similar and proximate to the subject property for consideration in the sales comparison analysis and have made a dollar adjustment when appropriate to reflect the market reaction to those items of significant variation. If a significant item in a comparable property is superior to, or more favorable than, the subject property, I have made a negative adjustment to reduce the adjusted sales price of the comparable and, if a significant item in a comparable property is inferior to, or less favorable than the subject property, I have made a positive adjustment to increase the adjusted sales price of the comparable.
2. I have taken into consideration the factors that have an impact on value in my development of the estimate of market value in the appraisal report. I have not knowingly withheld any significant information from the appraisal report and I believe, to the best of my knowledge, that all statements and information in the appraisal report are true and correct.
3. I stated in the appraisal report only my own personal, unbiased, and professional analysis, opinions, and conclusions, which are subject only to the contingent and limiting conditions specified in this form.
4. I have no present or prospective interest in the property that is the subject to this report, and I have no present or prospective personal interest or bias with respect to the participants in the transaction. I did not base, either partially or completely, my analysis and/or the estimate of market value in the appraisal report on the race, color, religion, sex, handicap, familial status, or national origin of either the prospective owners or occupants of the subject property or of the present owners or occupants of the properties in the vicinity of the subject property.
5. I have no present or contemplated future interest in the subject property, and neither my current or future employment nor my compensation for performing this appraisal is contingent on the appraised value of the property.
6. I was not required to report a predetermined value or direction in value that favors the cause of the client or any related party, the amount of the value estimate, the attainment of a specific result, or the occurrence of a subsequent event in order to receive my compensation and/or employment for performing the appraisal. I did not base the appraisal report on a requested minimum valuation, a specific valuation, or the need to approve a specific mortgage loan.
7. I performed this appraisal in conformity with the Uniform Standards of Professional Appraisal Practice that were adopted and promulgated by the Appraisal Standards Board of The Appraisal Foundation and that were in place as of the effective date of this appraisal, with the exception of the departure provision of those Standards, which does not apply. I acknowledge that an estimate of a reasonable time for exposure in the open market is a condition in the definition of market value and the estimate I developed is consistent with the marketing time noted in the neighborhood section of this report, unless I have otherwise stated in the reconciliation section.
8. I have personally inspected the interior and exterior areas of the subject property and the exterior of all properties listed as comparables in the appraisal report. I further certify that I have noted any apparent or known adverse conditions in the subject improvements, on the subject site, or on any site within the immediate vicinity of the subject property of which I am aware and have made adjustments for these adverse conditions in my analysis of the property value to the extent that I had market evidence to support them. I have also commented about the effect of the adverse conditions on the marketability of the subject property.
9. I personally prepared all conclusions and opinions about the real estate that were set forth in the appraisal report. If I relied on significant professional assistance from any individual or individuals in the performance of the appraisal or the preparation of the appraisal report, I have named such individual(s) and disclosed the specific tasks performed by them in the reconciliation section of this appraisal report. I certify that any individual so named is qualified to perform the tasks. I have not authorized anyone to make a change to any item in the report; therefore, if an unauthorized change is made to the appraisal report, I will take no responsibility for it.

SUPERVISORY APPRAISER'S CERTIFICATION: If a supervisory appraiser signed the appraisal report, he or she certifies and agrees that: I directly supervise the appraiser who prepared the appraisal report, have reviewed the appraisal report, agree with the statements and conclusions of the appraiser, agree to be bound by the appraiser's certifications numbered 4 through 7 above, and am taking full responsibility for the appraisal and the appraisal report.

ADDRESS OF PROPERTY APPRAISED: 42 Fuskie Lane, Daufuskie Island, SC 29915

APPRAISER  **SUPERVISORY APPRAISER** (only if required):

Signature: 	Signature: _____
Name: <u>Berendina E. Page</u>	Name: _____
Date Signed: <u>April 15, 2012</u>	Date Signed: _____
State Certification #: <u>2571</u>	State Certification #: _____
or State License #: _____	or State License #: _____
State: <u>SC</u>	State: _____
Expiration Date of Certification or License: <u>06/30/2012</u>	Expiration Date of Certification or License: _____
	☐ Did ☐ Did Not Inspect Property

[illegible]

Sharon G. Burris
BEAUFORT COUNTY AUDITOR

TITLE TO REAL ESTATE

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said Grantee(s) as joint tenants with the right of survivorship and not as tenants in common, their Heirs and Assigns forever; subject, however, to the rights, conditions and restrictions that constitute covenants running with the land, all as set forth herein.

AND Grantor does hereby bind itself and its successors, Assigns, to warrant and forever defend, all and singular, the said Premises unto the said Grantee(s) their Heirs and Assigns, against itself and its successors, and all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

WITNESS my Hand(s) and Seal(s), this 6th day of June in the year of our Lord two thousand and one and in the two hundred and twenty-fifth year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

(2) Charles B. Kilgore
Signature of 1st Witness
(3) [Signature]
Signature of 2nd Witness/Notary Public

North American Telecom, Ltd.
By: [Signature]
Christman E. Schafer, President
(1) _____

STATE OF SC)
COUNTY OF Beaufort)

ACKNOWLEDGMENT

I, the undersigned notary, do hereby certify that Christman E. Schafer, President of North American Telecom, Ltd., personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this the 6th day of June, 2001.

(4) [Signature] (SEAL)
NOTARY PUBLIC FOR SC

My commission expires: 2-14-2005

Instructions for Execution of Deed
(Please Follow Carefully - and Use Blue Ink Only)

- A. Grantor(s) sign on line numbered (1).
- B. Two (2) disinterested Witnesses sign on lines numbered (2) and (3). Notary may be one of the witnesses.
- C. Notary Public signs on line numbered (4) and affixes seal and expiration date.

COPY

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

BLOODY POINT PROPERTY
OWNERS' ASSOCIATION, INC.,

Plaintiff,

vs.

WILLIAM A. ASHTON, JR. and
MICHELE C. ASHTON,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
JUL 11 - 8 AM 8-38
CIVIL ACTION NO.: 2011-CP-07-2176

JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

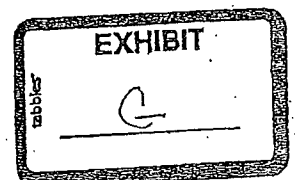
MASTER'S REPORT AND JUDGMENT
OF FORECLOSURE AND SALE

Pursuant to Rule 53, *South Carolina Rules of Civil Procedure*, the above-entitled matter was referred to the undersigned to make appropriate findings of fact and conclusions of law with authority to enter a final judgment in the cause.

Pursuant to the Order of Reference, the testimony was taken, which is reported herewith, and from the testimony and evidence, I find and conclude as follows:

FINDINGS OF FACT:

1. The parties and the subject matter of this case are properly before this Court.
2. The Lis Pendens was filed by Plaintiff on May 17, 2011.
3. The Plaintiff's Summons and Complaint were filed on May 17, 2011.
4. Service of the Plaintiff's Summons, Complaint and Lis Pendens was made upon the Defendants, as is shown by the Affidavit of Service filed herein.
5. The Defendants William A. Ashton, Jr. and Michele C. Ashton (hereinafter collectively referred to as "Ashton") are in default as shown by the Affidavit of Default filed herein.



6. The Defendants were notified of the time, date and place of the Hearing in this matter by mailing said Notice to the Defendants, or attorney for Defendants, at their last known addresses on November 15, 2011.

7. The records of this action show that this suit is upon a cause of action for the foreclosure of a Lien on certain property being known as Lot 55 Daufuskie Island Club, Bloody Point, Beaufort County, South Carolina, owned by Defendants Ashton as described in the Complaint. The above-described property is subject to a Master Deed and set of restrictive covenants which grant unto Plaintiff the right to file a lien and foreclose the lien for unpaid regime assessments. Assessments have not been paid plus additional charges and fees amounting to Two Thousand Nine Hundred Seventy-One and 70/100 Dollars (\$2,971.70) as of December 2, 2011.

8. The sum of Four Thousand Seven Hundred Eighty-Eight and 97/100 Dollars (\$4,788.97) is a reasonable fee to allow as attorneys' fees for Plaintiff's attorneys for services performed and anticipated to be performed until final adjudication of the within action, including costs.

9. The amount due and owing Bloody Point with fees at the rates provided in the restrictive Covenants, and other costs and expenses of collection, including attorneys' fees, pursuant to the Covenants, is as follows:

(A) Amount due December 2, 2011	<u>\$ 2,971.70</u>
(B) Attorney's fees through December 2, 2011	<u>\$ 4,788.97</u>
(C) Fees and costs to conclude action	<u>\$ 950.00</u>
TOTAL DEBT through December 2, 2011, Including interest to date shown:	<u>\$ 8,710.67</u>

Interest for the period from the date shown in (A) above through the date of the judgment to be added at the judicial rate, along with late fees and attorney's fees.

10. The Plaintiff is seeking foreclosure of the lien and has in the Complaint expressly demanded the right to a personal or deficiency Judgment against the Defendants Ashton.

11. The subject property is not the primary residence of the debtors and is not subject to the requirements of S.C. Code 15-41-10, et seq. The subject property is exempt from foreclosure intervention.

CONCLUSIONS OF LAW

I, therefore, conclude as follows:

1. That proper jurisdiction is in Beaufort County, South Carolina, and that this matter has been referred to and is properly before this Master.

2. That the Defendants Ashton are liable to Plaintiff for all amounts due for payments, accrued interest and the costs of collection, of same including attorneys' fees.

3. That the Plaintiff should have judgment of foreclosure of the Lien.

4. That the said property should be ordered sold at public auction after due advertisement. The sale should 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 judicial rate from date of sale to the date of compliance.

5. That the proceeds arising from such sale should be applied first, to the costs and disbursements of this action; and next, to the payment and discharge of the amount of 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.

6. The deed of conveyance made pursuant to said sale should contain the names of only the Plaintiff and the Defendants who are the titleholders of the property at the time of the filing of the Lis Pendens of the within action and the name of the grantee, and the Clerk of Court/Register of Deeds should be authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That there is due to the Plaintiff on the obligation set forth in the Complaint the sum of Eight Thousand Seven Hundred Ten and 67/100 Dollars (\$8,710.67) as set out in Paragraph 9, plus additional costs required of this action, to specifically include the commission paid to the Master in Equity, if Plaintiff is the successful purchaser at the sale of the property. Plaintiff will have Judgment against Defendants Ashton in the amounts set forth above.

2. The amount due in the preceding paragraph shall constitute the total Judgment debt due the Plaintiff and shall bear interest hereafter at the judicial rate.

3. That the Defendants liable for the aforesaid debt shall on or before the date of sale of the property interest hereinafter described, pay to the Plaintiff, or Plaintiff's attorney, the amount of Plaintiff's debt as aforesaid, together with the costs and disbursements of this action.

4. That on default of payment at or before the time herein indicated, the property interest described in the Complaint, as hereinafter set forth, be sold by the undersigned Master in Equity at public auction at the Beaufort County Courthouse in the City of Beaufort, County and State aforesaid, on some convenient sales day hereafter as specified in the Notice of Sale (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 will require a deposit of Five percent (5%) on the amount of the bid (in certified funds), the same to be applied on the purchase price only upon compliance with the bid, but in case on non-compliance within thirty (30) days, the same to be forfeited and applied to the costs and Plaintiff's debt.

B. Interest on the balance of the bid shall be paid to the day of compliance at the judicial rate.

C. The sale shall be subject to existing easements and restrictions of record.

D. Purchaser to pay for the cost of recording the deed.

5. If Plaintiff is the successful bidder at the 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 Plaintiff's indebtedness.

6. Personal or deficiency judgment being demanded, the bidding will remain open for a period of thirty (30) days following the date of Sale.

7. That the undersigned Master in Equity, will be advertisement according to law, give notice of the time, and place of sale, and the terms thereof; and will execute to the Purchaser, or Purchasers, a deed to the property interest 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, should fail to comply with the terms thereof within thirty (30) days after date of sale, then the undersigned Master may advertise the said premises for sale on the next, or some other subsequent sales day, at the risk of the highest bidder, and so from time to time thereafter until a full compliance shall be secured.

8. That the undersigned Master will apply the proceeds of the sale as follows:

FIRST: To the payment of the amount of the costs and expenses of this action;

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

NEXT: Any surplus will be held pending further Order of this Court.

9. It is further ORDERED, ADJUDGED AND DECREED that in the event the successful bidder is other than the Defendants in possession herein, the Sheriff of Beaufort 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 his assigns in full, quiet and peaceable possession of said premises without delay, and to keep said successful bidder or his assigns in such peaceable possession.

10. And it is further ORDERED, ADJUDGED AND DECREED that the Defendants named herein, Ashton, and all persons whosoever claiming under them, be forever barred and foreclosed of all right, title, interest, and equity of redemption in the said premises so sold, or any part thereof.

11. IT IS FURTHER ORDERED that the deed of conveyance made pursuant to said sale shall contain the names of only the first-named Plaintiff and the first-named Defendant, and the Defendant who was the title holder of the property interest at the time of the filing of the Lis Pendens of the within action, and the name of the grantee, and the Register of Deeds is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deed.

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

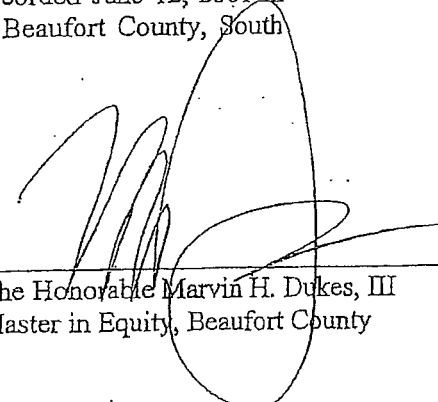
13. The following is a description of the premises herein ordered to be sold:

All that certain piece, parcel or lot of land situate, lying and being on Daufuskie Island, Beaufort County, South Carolina, known and described as Lot Number Fifty-Five (55) Daufuskie Island Club, Phase I, Bloody Point, and being more particularly shown and described on a plat thereof recorded in the Beaufort County Records in Plat Book 37 at Page 12 and revised in Plat Book 50 at Page 101. For a more detailed description as to courses, metes and bounds, reference may be made to said plat of record.

This property is subject to all applicable covenants, conditions, restrictions, easements and/or rights-of-way filed of record in the Office of the Register of Deeds for Beaufort County, South Carolina, including, but not limited to those certain Declaration of Covenants, Conditions and Restrictions for the Daufuskie Island Club Homesites, dated October 26, 1989 and recorded in the Beaufort County Records in Deed Book 539 at Page 1350, as amended.

This being the same property conveyed unto William A. Ashton, Jr., M.D. and Michele C. Ashton by Deed of North American Telecom, Ltd., dated June 6, 2001 and recorded June 12, 2001 in the Office of the Register of Deeds for Beaufort County, South Carolina in Record Book 1431 at Page 32.

TMS #: R800 027 00A 0055 0000



The Honorable Marvin H. Dukes, III
Master in Equity, Beaufort County

December 6, 2011

Beaufort, South Carolina

F:\Client\B\BloodyPoint\Collections\Ashton\Pleadings\Masters Report and Judgment.doc

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

Bloody Point Property Owners'
Association, Inc.,)

Plaintiff,)

vs.)

William A. Ashton, Jr. and Michele
C. Ashton,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-07-2176

AFFIDAVIT OF
MICHELE C. ASHTON

2012 MAR -9 AM 9:46
CLERK OF COURT
BEAUFORT COUNTY, S.C.

PERSONALLY APPEARED BEFORE ME, Michele C. Watson, who first being duly sworn doth depose and states as follows:

1. That I reside at 120 Marlbrooke Way, Kennett Square, Pennsylvania 19348.
2. That I have resided at 120 Marlbrooke Way, Kennett Square, Pennsylvania 19348, since 1989.
3. That on June 12, 2001, in exchange for the sum of Two Hundred One Thousand Five Hundred (\$201,500.00) Dollars, I, along with my husband, William A. Ashton, Jr., took title to property known as Lot Number Fifty-Five (55), Daufuskie Island Club, Phase I, Bloody Point, Beaufort County, South Carolina ("Property").
4. That ever since I took title to the Property in 2001, the planned unit development, Bloody Point, and the owners association, Bloody Point Property Owners Association, Inc. ("Association"), have experienced financial difficulties and operated sporadically, at best.
5. That several years ago, I received a letter from the Association informing me that Bloody Point had gone "belly up," and that the golf course had been shut down.

6. That due to the lack of continuity with the operation of Bloody Point and the Association, I was not notified and was not aware of any maintenance fees and/or property assessments that were due and owing.

7. That I have been informed that on or about May 17, 2011, the Association filed suit against me for unpaid property assessments.

8. That on or about January 14, 2012, I received a letter from Marvin H. Dukes, III, Master in Equity for Beaufort County, South Carolina, which indicated that the Property was foreclosed by the Association and sold at a foreclosure sale.

9. That I have been informed that Corporal Kurt Hansen of the Chester County Pennsylvania Sheriff's Department, attempted to serve me during business hours at my residence on four different occasions.

10. That on May 31, 2011 at 11:32 a.m., June 6, 2011 at 9:50 a.m., June 6, 2011 at 7:08 p.m., and June 14, 2011 at 11:30 a.m., I was not at home, but at work, when Corporal Hansen attempted to serve me with a copy of the Summons and Complaint; further, that I usually leave for work before 8:00a.m. in the morning.

11. That during his attempt to serve me, Corporal Hansen never left a business card at my residence, nor did he attempt to contact me directly during non-business hours.

12. That had Corporal Hansen left a business card or tried to contact me after normal business hours, then I would have been available for him to effectuate service of the Summons and Complaint.

13. That I was never served with, nor did I ever receive, a copy of the Summons and Complaint.

14. That, upon information and belief, the Association never mailed a copy of the Summons and Complaint to me at my residence as required by the Order for Publication which was filed on July 20, 2011, and the South Carolina Code of Laws.

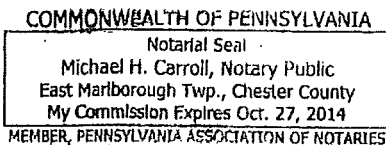
15. That had the Association mailed a copy of the Summons and Complaint to me at my residence, I would have immediately responded to the Complaint.

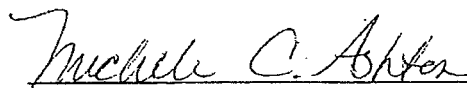
16. That I am informed that the Association allegedly effected service upon me by publishing the Summons and Notice of Filing Complaint in *The Island Packet*, a newspaper of general circulation in Beaufort County, South Carolina.

17. That *The Island Packet* is not a newspaper most likely to give me notice, as I reside in Chester County, Pennsylvania.

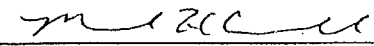
18. That had the Association published the Summons and Notice of Filing Complaint in *The Daily Local News*, a newspaper of general circulation in Chester County, Pennsylvania, then I would have received notice of the foreclosure action and immediately responded to the Complaint.

FURTHER AFFIANT SAYETH NOT.




Michele C. Ashton

Subscribed and sworn to before
me this 29 day of February, 2012.


Notary Public for the State of Pennsylvania
My Commission Expires: 10-27-2014

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Bloody Point Property Owners'
Association, Inc.,

Plaintiff,

vs.

William A. Ashton, Jr. and Michele
C. Ashton,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-07-2176

AFFIDAVIT OF
WILLIAM A. ASHTON, JR.

2012 MAR -9 AM 9:46
BEAUFORT COUNTY, S.C.
CLERK OF COURT

PERSONALLY APPEARED BEFORE ME, William A. Ashton, Jr., who first being duly sworn doth depose and states as follows:

1. That I reside at 120 Marlbrooke Way, Kennett Square, Pennsylvania 19348.
2. That I have resided at 120 Marlbrooke Way, Kennett Square, Pennsylvania 19348, since 1989.
3. That on June 12, 2001, in exchange for the sum of Two Hundred One Thousand Five Hundred (\$201,500.00) Dollars, I, along with my wife, Michele C. Ashton, took title to property known as Lot Number Fifty-Five (55), Daufuskie Island Club, Phase I, Bloody Point, Beaufort County, South Carolina ("Property").
4. That ever since I took title to the Property in 2001, the planned unit development, Bloody Point, and the owners association, Bloody Point Property Owners Association, Inc. ("Association"), have experienced financial difficulties and operated sporadically, at best.
5. That several years ago, I received a letter from the Association informing me that Bloody Point had gone "belly up," and that the golf course had been shut down.

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10. That on May 31, 2011 at 11:32 a.m., June 6, 2011 at 9:50 a.m., June 6, 2011 at 7:08 p.m., and June 14, 2011 at 11:30 a.m., I was not at home, but at work, when Corporal Hansen attempted to serve me with a copy of the Summons and Complaint; further, that I usually leave for work at 6:45 a.m. in the morning.

11. That during his attempt to serve me, Corporal Hansen never left a business card at my residence, nor did he attempt to contact me directly during non-business hours.

12. That had Corporal Hansen left a business card or tried to contact me after normal business hours, then I would have been available for him to effectuate service of the Summons and Complaint.

13. That I was never served with, nor did I ever receive, a copy of the Summons and Complaint.

14. That, upon information and belief, the Association never mailed a copy of the Summons and Complaint to me at my residence as required by the Order for Publication which was filed on July 20, 2011, and the South Carolina Code of Laws.

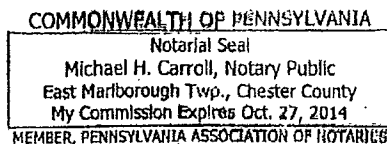
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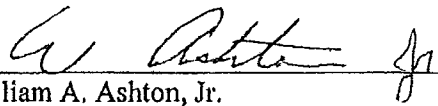
16. That I am informed that the Association allegedly effected service upon me by publishing the Summons and Notice of Filing Complaint in *The Island Packet*, a newspaper of general circulation in Beaufort County, South Carolina.

17. That *The Island Packet* is not a newspaper most likely to give me notice, as I reside in Chester County, Pennsylvania.

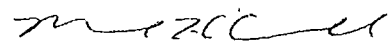
18. That had the Association published the Summons and Notice of Filing Complaint in *The Daily Local News*, a newspaper of general circulation in Chester County, Pennsylvania, then I would have received notice of the foreclosure action and immediately responded to the Complaint.

FURTHER AFFIANT SAYETH NOT.




William A. Ashton, Jr.

Subscribed and sworn to before
me this 29 day of February, 2012.


Notary Public for the State of Pennsylvania
My Commission Expires: 10-27-2014



Beaufort County, South Carolina

generated on 5/10/2012 11:59:57 AM EDT

Property ID (PIN)	Alternate ID (AIN)	Parcel Address	Data refreshed as of
R800 027 00A 0055 0000	01824887	42 FUSKIE LN,	4/7/2012

Current Parcel Information

Owner	FINGERHUT DAVID L SANTRY PATRICIA M	Property Class Code	ResVac Platted&Unplatted
Owner Address	63 SHIPYARD DRIVE 905 HILTON HEAD ISLAND SC 29928	Acreage	.5300
Legal Description	LOT 55 DAUFUSKIE ISLAND CLUB PH I PB37 P12		

Historic Information

Tax Year	Land	Building	Market	Taxes	Payment
2011	\$140,000		\$140,000	\$1,670.32	\$1,670.32
2010	\$140,000		\$140,000	\$1,647.63	\$1,812.39
2009	\$140,000		\$140,000	\$1,632.09	\$1,912.59
2008	\$181,500		\$181,500	\$2,387.21	\$2,387.21
2007	\$181,500		\$181,500	\$2,283.60	\$2,283.60
2006	\$181,500		\$181,500	\$2,079.97	\$2,079.97
2005	\$181,500		\$181,500	\$1,952.56	\$1,952.56
2004	\$181,500		\$181,500	\$1,892.47	\$1,892.47
2003	\$85,000		\$85,000	\$1,262.89	\$1,262.89
2002	\$85,000		\$85,000	\$1,210.87	\$1,210.87

Sales Disclosure

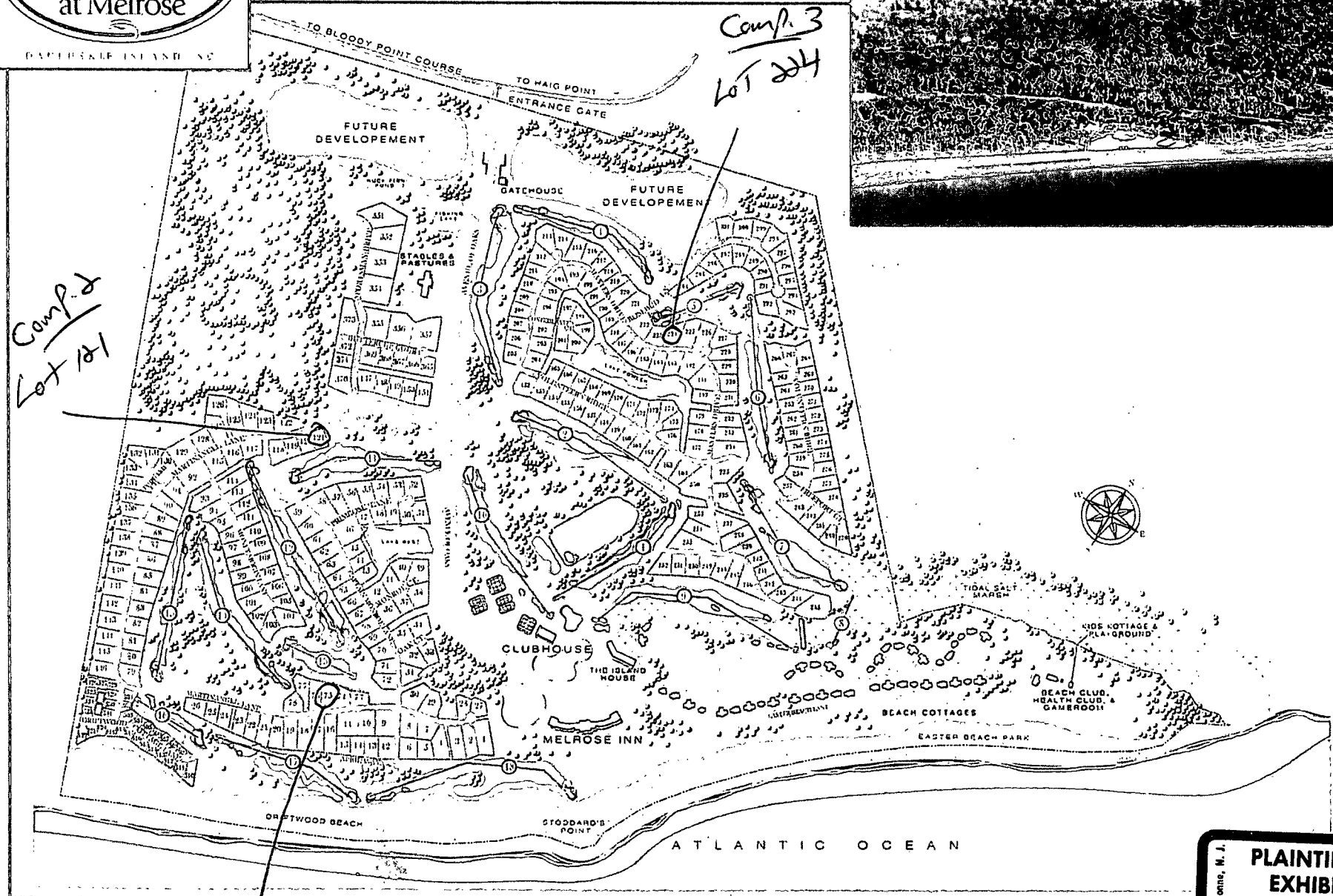
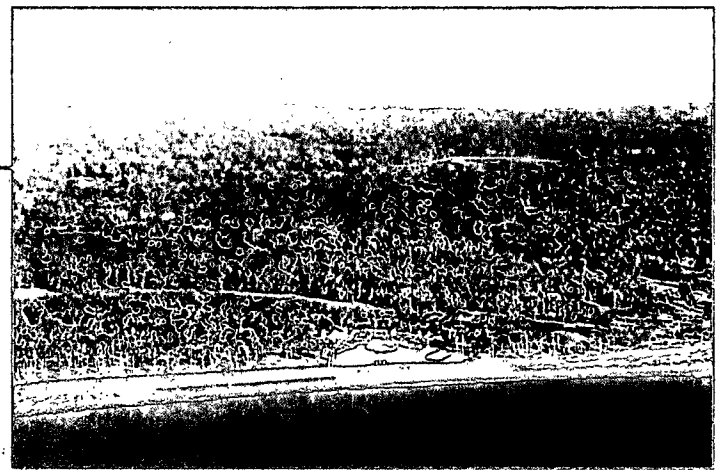
Grantor	Book & Page	Date	Deed	Vacant	Sale Price
ASHTON WILLIAM A JR MD MICHELE C	3111 1291	1/6/2012	Ti		\$8,800
NORTH AMERICAN TELECOM LTD	1431 32	6/6/2001	Fu		\$201,500
BLOODY POINT GROUP LTD P/S	1244 1954	12/9/1999	Fu		\$110,000
BLOODY POINT GROUP LTD P/S	539 1342	1/1/1980	QC		\$0
		12/31/1776	Or		\$0

Improvements

Building	Type	Use Code Description	Constructed Year	Stories	Rooms	Square Footage	Improvement Size

Features & Exterior Features

Building	Type	Feature Code	Description	No. / Sq.Ft.	Value



LAND/LOTS	70 Fuskie Ln	ML #: 305492



LP: ↓ \$149,000
 List Type: Exclusive Right w/MLS Agreement
 Area: Daufuskie Island
 Sub Area: Bloody Point
 St Add: 70 Fuskie Ln
 Lgl Add: 45 BLOODY POINT
 Tax Key #: 01825056
 Tax Map #: R800-027-00A-0045-0000
 Reg Fee:
 Transfer Fee: HG PT - Yes
 POA Fee: Bldy Pt U \$1150/Jan 12

Status: Sold
 City/Town: Daufuskie Island
 County: Beaufort
 Zip: 29915
 Zoning: Residential
 Elev:
 # Lots:
 # Acres:
 Approx Lot Size: .63
 Foreclosure: N
 Short Sale: N

Public/Internet Remarks

Great ocean property at Bloody Point! Enjoy SUNSETS FOREVER. Convenient beach access across the street.

Private/Confidential Remarks

General Information

Type: Full
 Land:
 Restrictions:
 Not Included in Sale:

Row:

Assess Land Val: \$140,000
 View: Deep Water, Golf
 Paved Road: Yes

Additional Features

Property Features:

Amenities: Clubhouse, Comm Dock, Comm Pool, Deep Water Access, Golf Privileges, Leisure Trails, Sec Gate/Guard, Community Tennis
 Finance: Cash-AllCash, Conventional
 Possession: At Closing

Trades:

Utility Information

Water: Community
 Sewer: Community

Other Utilities: Cable Avail, ElecAvail, PhneLinAvail

Brokerage Information

LA: 700289 - The Lowcountry Team
 LB: 269001 - Thomas Jackson
 Comp to CB: 4 CB Comp Amt/Type: 0.0 %
 Owner: George Victor Smith
 How to Show: Vacant Lot
 Internet: Yes
 Photo:
 VT # of Shots: VT Type:
 VT URL:

LA Email: info@thelowcountryteam.com
 Firm: Gateway Realty, LLC
 Fax: (843) 757-7711
 List Date: 12/06/2010
 Show Inst: Vacant Lot- Drive By

Contact #: (843) 757-7710
 Agent Cell: (843) 247-8880
 Firm #: 843-757-7710
 Exp Date: 08/31/2012

Photo Inst:
 VT Inst:

Sold Information

Pending Date: 07/11/2012
 Projected Closing Date: 09/15/2012
 Sell Agent: 481006 - Tony Simonelli

Sold Date: 09/14/2012
 Selling Terms: Cash-AllCash
 Sell Broker Code: 481

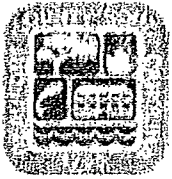
Sell Price: \$126,650
 Original LP: \$199,000
 DOM: 581

Monday, October 15, 2012

02:19 PM

Prepared By: Dini Page

INFORMATION IS BELIEVED TO BE ACCURATE BUT IS NOT GUARANTEED
 CONFIDENTIAL Restricted to Specific and intended Use of Members and Other Authorized Recipients Only. Not for Public Distribution



Beaufort County, South Carolina

generated on 10/15/2012 2:15:56 PM EDT

Property ID (PIN)	Alternate ID (AIN)	Parcel Address	Data refreshed as of
R800 027 00A 0045 0000	01825056	70 FUSKIE LN,	10/13/2012

Current Parcel Information

Owner	MANSTRANGELO KIMBERLY ANN	Property Class Code	ResVac Platted&Unplatted
Owner Address	208 STONEHILL DR ROCKY HILL CT 06067	Acreage	.6300
Legal Description	LOT 45 DAUFUSKIE ISLAND CLUB PH I PB37 P12		

Historic Information

Tax Year	Land	Building	Market	Taxes	Payment
2011	\$140,000		\$140,000	\$1,670.32	\$1,670.32
2010	\$140,000		\$140,000	\$1,647.63	\$1,697.06
2009	\$140,000		\$140,000	\$1,632.09	\$1,632.09
2008	\$170,000		\$170,000	\$2,236.63	\$2,303.73
2007	\$170,000		\$170,000	\$2,139.53	\$2,139.53
2006	\$170,000		\$170,000	\$1,948.79	\$1,948.79
2005	\$170,000		\$170,000	\$1,829.45	\$1,829.45
2004	\$170,000		\$170,000	\$1,772.89	\$1,772.89
2003	\$150,000		\$150,000	\$2,224.63	\$2,224.63
2002	\$150,000		\$150,000	\$2,132.83	\$2,132.83

Sales Disclosure

Grantor	Book & Page	Date	Deed	Vacant	Sale Price
SMITH GEORGE VICTOR TRUSTEE GEORG	3175 727	9/4/2012	Fu		\$126,650
GONTER THEODORE F CLAUDETTE M JTR	2127 84	3/26/2005	Fu		\$220,000
CORLEY HAROLD L SR	1346 269	10/9/2000	Fu		\$149,000
BLOODY POINT GROUP LTD P/S	539 1453	10/26/1989	Fu		\$200,000
BLOODY POINT GROUP LTD P/S	539 1342	1/1/1980	QC		\$0
		12/31/1776	Or		\$0

Improvements

Building	Type	Use Code Description	Constructed Year	Stories	Rooms	Square Footage	Improvement Size

Features & Exterior Features

Building	Type	Feature Code	Description	No. / Sq.Ft.	Value

Slideshow

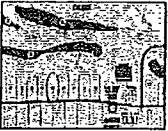
Photo Gallery

 
print close

Other



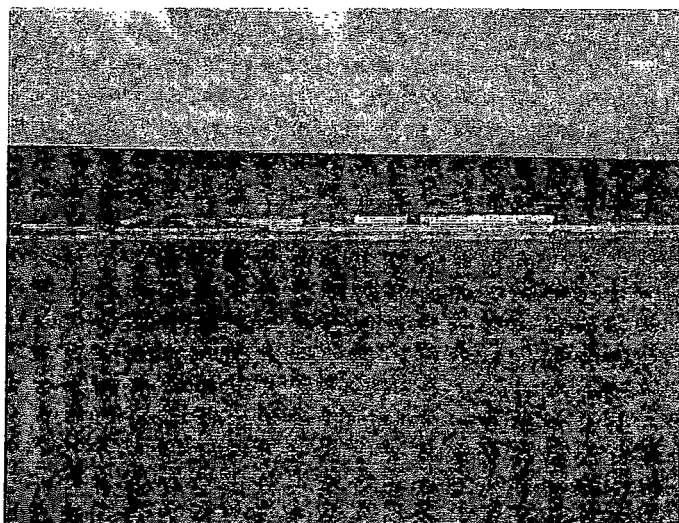
Other



Plat Map

 Previous Image Play SlideshowNext Image 

Other



SHHIMLS

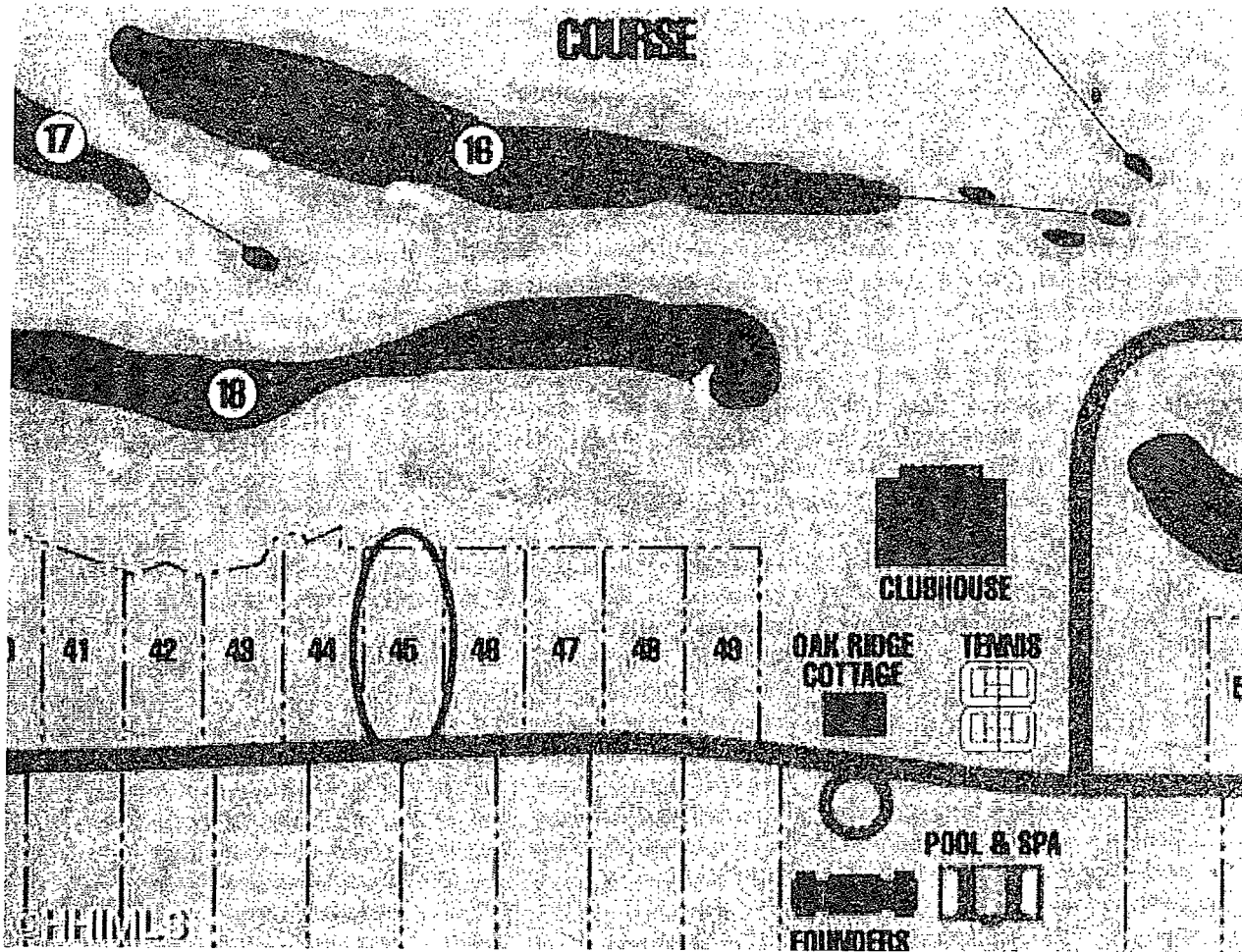


EXHIBIT "A"

All that certain piece, parcel or lot of land situate, lying and being on Daufuskie Island, Beaufort County, South Carolina, known and described as Lot Number Fifty-Five (55) Daufuskie Island Club, Phase I, Bloody Point, and being more particularly shown and described on a plat thereof recorded in the Beaufort County Records in Plat Book 37 at Page 12 and revised in Plat Book 50 at Page 101. For a more detailed description as to courses, metes and bounds, reference may be made to said plat of record.

This property is subject to all applicable covenants, conditions, restrictions, easements and/or rights-of-way filed of record in the Office of the Register of Deeds for Beaufort County, South Carolina, including, but not limited to those certain Declaration of Covenants, Conditions and Restrictions for the Daufuskie Island Club Homesites, dated October 26, 1989 and recorded in the Beaufort County Records in Deed Book 539 at Page 1350, as amended.

This being the same property conveyed unto William A. Ashton, Jr., M.D. and Michele C. Ashton by Deed of North American Telecom, Ltd., dated June 6, 2001 and recorded June 12, 2001 in the Office of the Register of Deeds for Beaufort County, South Carolina in Record Book 1431 at Page 32.

The within Deed was prepared in the Law Office of Finger & Fraser, P.A., Post Office Box 24005, Hilton Head Island, South Carolina 29925-4005 by Julie A. Serafino, Esquire.

TMS #: R800 027 00A 0055 0000

COPY

2011-90757-505

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

JERIL ANN ROSENEAU
BLOODY POINT PROPERTY
OWNERS' ASSOCIATION, INC.,

Plaintiff,

vs.

WILLIAM A. ASHTON, JR. and
MICHELE C. ASHTON,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-07-

WILLIAM A. ASHTON JR.
120 MARLBROOKWAY
KENNETT SQUARE,
19348

AFFIDAVIT OF SERVICE
SHERIFF'S COSTS

Date 5-24-11
\$ 150 Paid
Receipt No. 442 087
Expiration date: 6-16-11

RECEIVED
SHERIFF'S OFFICE
CHESTER COUNTY, PA.
MAY 23 AM 10:22

5/26

Personally appeared before me, _____, the undersigned deponent, who first being first duly sworn, deposes and says that s/he served a copy of a Civil Action Cover Sheet, Certificate of Exemption from Administrative Order, Lis Pendens, Summons and Complaint on WILLIAM A. ASHTON, JR., a Defendant in the above action by the following method:

- () By delivery to _____ personally at _____ (address), in _____ on the _____ day of _____, 2011.
- () By delivery to _____, a person of suitable age and discretion at the residence of Defendant, leaving with him/her a copy (or copies) of the same at _____ (address), in _____ on the _____ day of _____, 2011.
- () By delivering a copy (or copies) to an agent authorized by appointment or by law to receive service of process _____.

The Deponent is not a party of this action and has no interest therein or connection therewith. Service of Process was made in accordance with applicable statutes and the Rules of Civil Procedure in effect at the time of service.

() MILITARY STATUS: Y N If yes, what branch: _____ Type of ID: _____

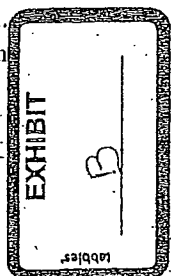
Sworn to before me this 14th day of JUNE, 2011.

Elizabeth M. Matha
Notary Public of Pennsylvania
My Commission Expires: 12/6/2011

Deponent's signature

- Attempts ① 5/31 @ 11:32 AM N/A Garage Door Open vehicle in Driveway.
② 6/6/11 @ 9:50 AM N/A
③ 6/6 @ 7:08 PM N/A
④ 6/14 @ 11:30 AM N/A

Record of Attempts on 4 Attempts, No Service
Page 180



COPY

2B.12.
2011-0757-505

STATE OF SOUTH CAROLINA)
2011 JUL 11 PM 4:17)
COUNTY OF BEAUFORT)

JERRI ANN ROSENEAU
CLERK OF COURT
BLOODY POINT PROPERTY)
OWNERS' ASSOCIATION, INC.,)

Plaintiff,

vs.

WILLIAM A. ASHTON, JR. and
MICHELE C. ASHTON,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-07-

MICHELE C. ASHTON
120 MARLBROOKE WAY
KENNETT SQUARE, PA
19348

AFFIDAVIT OF SERVICE

SHERIFF'S COSTS

Date 5-24-11

\$ 150 Paid

Receipt No. 442089

Expiration date: 6-16-11

RECEIVED
SHERIFF'S OFFICE
CHESTER COUNTY, PA.
2011 MAY 23 AM 11:32
5/22

Personally appeared before me, _____, the undersigned deponent, who first being first duly sworn, deposes and says that s/he served a copy of a Civil Action Cover Sheet Certificate of Exemption from Administrative Order, Lis Pendens, Summons and Complaint on MICHELE C. ASHTON, a Defendant in the above action by the following method:

() By delivery to _____ personally at _____ (address), in _____ on the _____ day of _____, 2011.

() By delivery to _____, a person of suitable age and discretion at the residence of Defendant, leaving with him/her a copy (or copies) of the same at _____ (address), in _____ on the _____ day of _____, 2011.

() By delivering a copy (or copies) to an agent authorized by appointment or by law to receive service of process _____.

The Deponent is not a party of this action and has no interest therein or connection therewith. Service of Process was made in accordance with applicable statutes and the Rules of Civil Procedure in effect at the time of service.

() MILITARY STATUS: Y N If yes, what branch: _____ Type of ID: _____

Sworn to before me this 14th day of JUNE, 2011.

[Signature]

Notary Public of Pennsylvania

My Commission Expires: 12/6/2011

Deponent's signature

Attempts ① 5/31 @ 11:32 AM N/A - Garage Door Open Vehicle In Driveway.

② 6/6/11 @ 9:50 AM N/A

③ 6/6 @ 7:08 PM N/A

④ 6/14 @ 11:30 AM N/A

No Answer on 4 Attempts. No Service.

Record of Appeal

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

BLOODY POINT PROPERTY)
OWNERS' ASSOCIATION, INC.,)

Plaintiff,)

vs.)

WILLIAM A. ASHTON, JR. and)
MICHELE C. ASHTON,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-07-2176

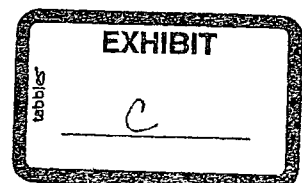
ORDER FOR PUBLICATION

11 JUL 20 AM 11:17
JEROME A. ROSEHEAD
BEAUFORT COUNTY, S.C.
CLERK OF COURT

It appearing to my satisfaction from the attached Affidavit for Order of Publication, the attorney for the Plaintiff, Bloody Point Property Owners' Association, Inc., and the Complaint herein, that a cause of action exists in favor of the Plaintiff against Defendants William A. Ashton, Jr. and Michele C. Ashton to foreclose a certain lien on real property, which is more fully described in the Complaint. The whereabouts of Defendants William A. Ashton, Jr. and Michele C. Ashton, are unknown and that said Defendants are necessary parties to the within action.

NOW, THEREFORE, on motion of Julie A. Serafino, Esquire, attorney for the Plaintiff, Bloody Point Property Owners' Association, Inc.,

IT IS ORDERED that the Summons herein, together with notice of the filing thereof in the office of the Clerk of Court for Beaufort County, South Carolina, be served upon the said Defendants by publication of the same in *The Island Packet*, a newspaper published in Beaufort County, State aforesaid, which newspaper is designated most likely to give notice to said Defendants, once a week for three consecutive weeks, and that a copy of the Summons and



Complaint be forwarded to said Defendants by depositing the same in the United States mail, postage prepaid, addressed to the last known address of said Defendants.

S. J. Roseneau

Jerri Ann Roseneau
Clerk of Court of Common Pleas
Beaufort County, South Carolina

July 18, 2011

Beaufort, South Carolina

SWORN TO before me this
_____ day of July, 2011.

Notary Public for South Carolina
My Commission Expires: _____

FINGER & FRASER, P.A.
ATTORNEYS AT LAW

TERRY A. FINGER *
DENSON H. FRASER, JR.
ANNE C. MARSCHER *o
TYLER A. MELNICK
JONATHAN A. MULLEN
JULIE A. SERAFINO ** *
MICHAEL C. CERRATI o

35 Hospital Center Common, Suite 200 (29926)
Post Office Box 24005
Hilton Head Island, South Carolina 29925
(843) 681-8802 Facsimile
(843) 681-7000 Telephone
jserafino@fingerlaw.com

Also admitted in:
* Georgia
** New Jersey
* Pennsylvania
o California
† New York

Of Counsel:
ARTHUR F. ANDREWS †

o Court Certified Mediator
* Court Certified Arbitrator / Mediator

July 21, 2011

William A. Ashton, Jr.
120 Marlbrooke Way
Kennett Square, PA 19348

Michele C. Ashton
120 Marlbrooke Way
Kennett Square, PA 19348

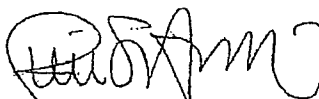
Re: *Bloody Point Property Owners' Association, Inc. vs. William A. Ashton, Jr. and
Michele C. Ashton*
Civil Action No. 2011-CP-07-2176
Our File No.: 1933.010

Dear Mr. and Mrs. Ashton:

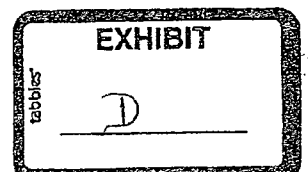
Pursuant to the Order For Publication filed in the Office of the Clerk of Court for Beaufort County, South Carolina on July 20, 2011, enclosed please find copies of the Civil Action Coversheet, Certificate of Exemption from Administrative Order, Lis Pendens, Summons, Complaint, Affidavit For Order of Publication, Motion and Order Information Form and Cover Sheet, Order For Publication and Notice of Filing of Complaint in the above referenced matter.

Very truly yours,

FINGER & FRASER, P.A.


Julie A. Serafino

JAS/rgw
Enclosures



STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT: IN THE COURT OF COMMON PLEAS: FOURTEENTH JUDICIAL CIRCUIT: CIVIL ACTION NO.: 2018-CP-07-2176-BLOODY POYNTER PROPERTY OWNERS ASSOCIATION, INC. Plaintiff vs. WILLIAM ASHTON JR. and MICHELE ASHTON, Defendants NOTICE OF COMPLAINT TO THE DEFENDANTS ABOVE NAMED NOTICE IS HEREBY GIVEN THAT the original complaint in the above entitled action was filed in the office of the Clerk of Court for Beaufort County on May 17, 2018 FINGER & FRASER P.A. Julie A. Serafinio P.O. Box 24005 Hilton Head Island SC 29925-0040 (843) 681-7000 Attorneys for Plaintiff July 11, 2018 Hilton Head Island, South Carolina SUMMONS (Notary - User Foreclosure) TO THE DEFENDANTS ABOVE NAMED: YOU ARE HEREBY SUMMONED to appear and answer the complaint in this action a copy of which has been served upon you and to serve a copy of your answer to said complaint on the undersigned either at the address of the Hospital Center Community Suite 24005 or at P.O. Box 24005 Hilton Head Island South Carolina 29925-0040. If you fail to do so you will be held responsible for the costs of the lawsuit and may be forced to pay the balance of the mortgage loan secured by the deed of trust recorded in the public records of Beaufort County, South Carolina as well as the attorney's fees and costs incurred in enforcing the terms of the deed of trust. You are also notified that if you fail to appear and answer the complaint in this action a default judgment may be entered against you and you may lose your home without notice. This summons is being sent to you by first class mail and by electronic means. If you need more information regarding this matter please call the undersigned at the number listed below.

FILED FOR RECORD AND INDEXING BY CLERK OF COURT JUL 11 2018

Personally appeared before me a Notary Public, in and for State of South Carolina, the undersigned, Sara Johnson Borton who being duly sworn according to oath and says that she is the Publisher and President of *The Island Packet Beaufort Gazette*, newspapers published Sunday through Saturday in Beaufort County, **NOTICE OF FILING OF COMPLAINT, IN CIVIL ACTION NO.: 2011-CP-07-2176 BLOODY POINT PIER OWNERS' ASSOCIATION, INC., vs. WILLIAM A. ASHTON, MICHELE C. ASHTON**, was published in the issue(s) of *The Island Packet Beaufort Gazette* on July 22, 29, August 5, 2011.

Sarah Johnson PM

Sara Johnson Borton,
Publisher and President
The Island Packet/The Beaufort Gazette

Subscribed and sworn to before
me this 8th day of August 2011

Shank Green

Notary Public for South Carolina

My Commission Expires on July 13, 2020

AUG 11 AM 11:00
 JEROME A. ROSENBAUM
 DEANFORD COUNTY, S.C.
 CLERK OF COURT

EXHIBIT

11

COPY

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

BLOODY POINT PROPERTY
OWNERS' ASSOCIATION, INC.,

Plaintiff,

vs.

WILLIAM A. ASHTON, JR. and
MICHELE C. ASHTON,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-07-2176

MOTION AND ORDER OF
DEFAULT AND REFERENCE

FILED
FOR THE
CLERK OF COURT
JAN 11 2012
8 28 PM 12:11

This action is one for foreclosure of a regime lien, for unpaid fees and assessments on specific real property. The Lis Pendens, Summons and Complaint were filed on May 17, 2011. The Defendants are in default.

IT APPEARING that the Defendants William A. Ashton, Jr. and Michele C. Ashton are now in default; and

IT FURTHER APPEARING that pursuant to Rule 53(b), SCRPC as amended, effective September 1, 2002, that this foreclosure is a proper matter to be referred to the Master-in-Equity for Beaufort County, with authority to enter a final judgment in the cause; and,

NOW, upon motion of the attorney for the Plaintiff,

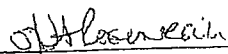
IT IS ORDERED that the Defendants, WILLIAM A. ASHTON, JR. and MICHELE C. ASHTON, are in default and this case is referred to the Honorable Marvin H. Dukes, III, Master-in-Equity for Beaufort County, who, pursuant to Rule 53(c), SCRPC, shall exercise all power and authority which a Circuit Judge sitting without a jury would have, including but not limited to, making findings of fact and conclusions of law; directing entry of final judgment in this action; hearing any

EXHIBIT

F

issues, including motions, after sale or judgment; issuing any and all Orders and Supplemental Orders, Writs of Assistance and hearing any issues involving possession and/or removal of property and appraisal proceedings under Section 29-3-360, *et seq.* of the South Carolina Code. Pursuant to Rule 53(e), SCRCF, any appeal from the final judgment entered by the Master-in-Equity shall be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules. Any judicial sale of the property subject of this action may be held on a day other than the regular judicial sale day.

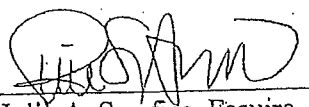
IT IS SO ORDERED!


~~Chief Administrative Judge or Clerk of Court~~
Beaufort County, South Carolina

September 27, 2011
Beaufort, South Carolina

I SO MOVE:

FINGER & FRASER, P.A.


Julie A. Serafino, Esquire
35 Hospital Center Common, Suite 200
Post Office Box 24005
Hilton Head, South Carolina 29925-4005
(843) 681-7000
Attorney for Plaintiff

COPY

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

BLOODY POINT PROPERTY
OWNERS' ASSOCIATION, INC.,)

Plaintiff,)

vs.)

WILLIAM A. ASHTON, JR. and
MICHELE C. ASHTON,)

Defendants.)

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

2011 DEC -6 AM 9:34
CIVIL ACTION NO.: 2011-CP-07-2176

JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

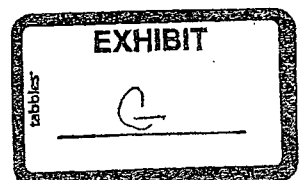
MASTER'S REPORT AND JUDGMENT
OF FORECLOSURE AND SALE

Pursuant to Rule 53, *South Carolina Rules of Civil Procedure*, the above-entitled matter was referred to the undersigned to make appropriate findings of fact and conclusions of law with authority to enter a final judgment in the cause.

Pursuant to the Order of Reference, the testimony was taken, which is reported herewith, and from the testimony and evidence, I find and conclude as follows:

FINDINGS OF FACT:

1. The parties and the subject matter of this case are properly before this Court.
2. The Lis Pendens was filed by Plaintiff on May 17, 2011.
3. The Plaintiff's Summons and Complaint were filed on May 17, 2011.
4. Service of the Plaintiff's Summons, Complaint and Lis Pendens was made upon the Defendants, as is shown by the Affidavit of Service filed herein.
5. The Defendants William A. Ashton, Jr. and Michele C. Ashton (hereinafter collectively referred to as "Ashton") are in default as shown by the Affidavit of Default filed herein.



6. The Defendants were notified of the time, date and place of the Hearing in this matter by mailing said Notice to the Defendants, or attorney for Defendants, at their last known addresses on November 15, 2011.

7. The records of this action show that this suit is upon a cause of action for the foreclosure of a Lien on certain property being known as Lot 55 Daufuskie Island Club, Bloody Point, Beaufort County, South Carolina, owned by Defendants Ashton as described in the Complaint. The above-described property is subject to a Master Deed and set of restrictive covenants which grant unto Plaintiff the right to file a lien and foreclose the lien for unpaid regime assessments. Assessments have not been paid plus additional charges and fees amounting to Two Thousand Nine Hundred Seventy-One and 70/100 Dollars (\$2,971.70) as of December 2, 2011.

8. The sum of Four Thousand Seven Hundred Eighty-Eight and 97/100 Dollars (\$4,788.97) is a reasonable fee to allow as attorneys' fees for Plaintiff's attorneys for services performed and anticipated to be performed until final adjudication of the within action, including costs.

9. The amount due and owing Bloody Point with fees at the rates provided in the restrictive Covenants, and other costs and expenses of collection, including attorneys' fees, pursuant to the Covenants, is as follows:

(A) Amount due December 2, 2011	<u>\$ 2,971.70</u>
(B) Attorney's fees through December 2, 2011	<u>\$ 4,788.97</u>
(C) Fees and costs to conclude action	<u>\$ 950.00</u>
TOTAL DEBT through December 2, 2011, Including interest to date shown:	<u>\$ 8,710.67</u>

Interest for the period from the date shown in (A) above through the date of the judgment to be added at the judicial rate, along with late fees and attorney's fees.

10. The Plaintiff is seeking foreclosure of the lien and has in the Complaint expressly demanded the right to a personal or deficiency Judgment against the Defendants Ashton.

11. The subject property is not the primary residence of the debtors and is not subject to the requirements of *S.C. Code 15-41-10, et seq.* The subject property is exempt from foreclosure intervention.

CONCLUSIONS OF LAW

I, therefore, conclude as follows:

1. That proper jurisdiction is in Beaufort County, South Carolina, and that this matter has been referred to and is properly before this Master.

2. That the Defendants Ashton are liable to Plaintiff for all amounts due for payments, accrued interest and the costs of collection, of same including attorneys' fees.

3. That the Plaintiff should have judgment of foreclosure of the Lien.

4. That the said property should be ordered sold at public auction after due advertisement. The sale should 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 judicial rate from date of sale to the date of compliance.

5. That the proceeds arising from such sale should be applied first, to the costs and disbursements of this action; and next, to the payment and discharge of the amount of 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.

6. The deed of conveyance made pursuant to said sale should contain the names of only the Plaintiff and the Defendants who are the titleholders of the property at the time of the filing of the Lis Pendens of the within action and the name of the grantee, and the Clerk of Court/Register of Deeds should be authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That there is due to the Plaintiff on the obligation set forth in the Complaint the sum of Eight Thousand Seven Hundred Ten and 67/100 Dollars (\$8,710.67) as set out in Paragraph 9, plus additional costs required of this action, to specifically include the commission paid to the Master in Equity, if Plaintiff is the successful purchaser at the sale of the property. Plaintiff will have Judgment against Defendants Ashton in the amounts set forth above.

2. The amount due in the preceding paragraph shall constitute the total Judgment debt due the Plaintiff and shall bear interest hereafter at the judicial rate.

3. That the Defendants liable for the aforesaid debt shall on or before the date of sale of the property interest hereinafter described, pay to the Plaintiff, or Plaintiff's attorney, the amount of Plaintiff's debt as aforesaid, together with the costs and disbursements of this action.

4. That on default of payment at or before the time herein indicated, the property interest described in the Complaint, as hereinafter set forth, be sold by the undersigned Master in Equity at public auction at the Beaufort County Courthouse in the City of Beaufort, County and State aforesaid, on some convenient sales day hereafter as specified in the Notice of Sale (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 will require a deposit of Five percent (5%) on the amount of the bid (in certified funds), the same to be applied on the purchase price only upon compliance with the bid, but in case on non-compliance within thirty (30) days, the same to be forfeited and applied to the costs and Plaintiff's debt.

B. Interest on the balance of the bid shall be paid to the day of compliance at the judicial rate.

C. The sale shall be subject to existing easements and restrictions of record.

D. Purchaser to pay for the cost of recording the deed.

5. If Plaintiff is the successful bidder at the 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 Plaintiff's indebtedness.

6. Personal or deficiency judgment being demanded, the bidding will remain open for a period of thirty (30) days following the date of Sale.

7. That the undersigned Master in Equity, will be advertisement according to law, give notice of the time, and place of sale, and the terms thereof; and will execute to the Purchaser, or Purchasers, a deed to the property interest 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, should fail to comply with the terms thereof within thirty (30) days after date of sale, then the undersigned Master may advertise the said premises for sale on the next, or some other subsequent sales day, at the risk of the highest bidder, and so from time to time thereafter until a full compliance shall be secured.

8. That the undersigned Master will apply the proceeds of the sale as follows:

FIRST: To the payment of the amount of the costs and expenses of this action;

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

NEXT: Any surplus will be held pending further Order of this Court.

9. It is further ORDERED, ADJUDGED AND DECREED that in the event the successful bidder is other than the Defendants in possession herein, the Sheriff of Beaufort 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 his assigns in full, quiet and peaceable possession of said premises without delay, and to keep said successful bidder or his assigns in such peaceable possession.

10. And it is further ORDERED, ADJUDGED AND DECREED that the Defendants named herein, Ashton, and all persons whosoever claiming under them, be forever barred and foreclosed of all right, title, interest, and equity of redemption in the said premises so sold, or any part thereof.

11. IT IS FURTHER ORDERED that the deed of conveyance made pursuant to said sale shall contain the names of only the first-named Plaintiff and the first-named Defendant, and the Defendant who was the title holder of the property interest at the time of the filing of the Lis Pendens of the within action, and the name of the grantee, and the Register of Deeds is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deed.

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

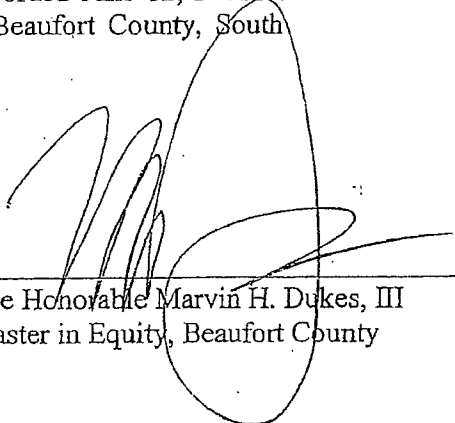
13. The following is a description of the premises herein ordered to be sold:

All that certain piece, parcel or lot of land situate, lying and being on Daufuskie Island, Beaufort County, South Carolina, known and described as Lot Number Fifty-Five (55) Daufuskie Island Club, Phase I, Bloody Point, and being more particularly shown and described on a plat thereof recorded in the Beaufort County Records in Plat Book 37 at Page 12 and revised in Plat Book 50 at Page 101. For a more detailed description as to courses, metes and bounds, reference may be made to said plat of record.

This property is subject to all applicable covenants, conditions, restrictions, easements and/or rights-of-way filed of record in the Office of the Register of Deeds for Beaufort County, South Carolina, including, but not limited to those certain Declaration of Covenants, Conditions and Restrictions for the Daufuskie Island Club Homesites, dated October 26, 1989 and recorded in the Beaufort County Records in Deed Book 539 at Page 1350, as amended.

This being the same property conveyed unto William A. Ashton, Jr., M.D. and Michele C. Ashton by Deed of North American Telecom, Ltd., dated June 6, 2001 and recorded June 12, 2001 in the Office of the Register of Deeds for Beaufort County, South Carolina in Record Book 1431 at Page 32.

TMS #: R800 027 00A 0055 0000



The Honorable Marvin H. Dukes, III
Master in Equity, Beaufort County

December 6, 2011

Beaufort, South Carolina

F:\Client\B\BloodyPoint\Collections\Ashton\Pleadings\Masters Report and Judgment.doc

COPY

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

BLOODY POINT PROPERTY
OWNERS' ASSOCIATION, INC.,)

Plaintiff,)

vs.)

WILLIAM A. ASHTON, JR. and
MICHELE C. ASHTON,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-07-2176

MASTER'S REPORT OF SALE

2012 FEB -2 AM 11:39
J. ROSENEAD
BEAUFORT COUNTY, S.C.
CLERK OF COURT

I, MARVIN H. DUKES, III, the undersigned Master In Equity for Beaufort County, do report that pursuant to Judgment of this Court made in the above entitled action and dated December 2, 2011, this Court, after due legal notice, advertised and published according to law, I sold the property herein described on January 3, 2012, for Eight Thousand Eight Hundred and 00/100 Dollars (\$8,800.00) to third party bidders, David L. Fingerhut and Patricia M. Santry.

That I have executed and delivered to the said purchaser a good and sufficient Deed of said premises upon complying with the terms of such sale, as recorded in the Office of the Register of Deeds for Beaufort County in Record Book 3111 at Page 1291 on January 11, 2012.

That I have paid out and disposed of the proceeds of said sale as outlined on the Statement of Receipts and Disbursements attached hereto as Exhibit "A".

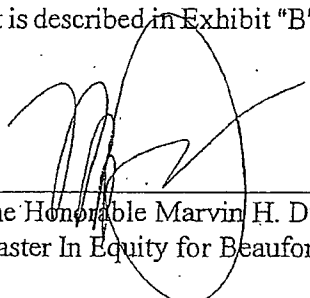
That from the statement hereto annexed will appear the amounts expended by me and for which I hold receipt on file in my office.

The description of land referred to in this Report is described in Exhibit "B", attached hereto.

All of which is respectfully submitted.

January 70, 2012

Beaufort, South Carolina


The Honorable Marvin H. Dukes, III
Master In Equity for Beaufort County

EXHIBIT

H

Plaintiff: Bloody Point POA

Defendant: William A Ahton Jr et al

Case #: 2011-CP-07-02176

Successful Bidder: David Fingerhut
63 Shipyard Dr 905
HHI SC 29928
843-842-8582

STATEMENT OF RECEIPTS AND DISBURSEMENTS

Sale Date: January 3 2012
Compliance Date: February 2 2012

INTEREST CALCULATION/ AMOUNT DUE PER FORECLOSURE ORDER

	Amount	Check#	Date	Receipt#
Bid Amount:	\$8,800.00			
Deposit	\$8,800.00	1409757	1/3/12	231734
Net Due (before interest)	0.00			

Interest Accrual per Order
7.25% on \$0.00 for 0 days(\$0.00@day)

TOTAL AMOUNT DUE FROM PURCHASER \$0.00

INTEREST CALCULATION/AMOUNT DUE PER FORECLOSURE ORDER

	Amount	Check#	Date	Receipt#
Deposit	\$8,800.00			
Balance from Purchaser	\$0.00			
Total Received	<u>\$8,800.00</u>			

Amount paid to Beaufort Co Treasurer	\$88.00	1860	1/9/12
Amount paid to Plaintiff's attorney	<u>\$8,710.67</u>	1861	1/9/12

Remaining Balance/Excess funds

1.33

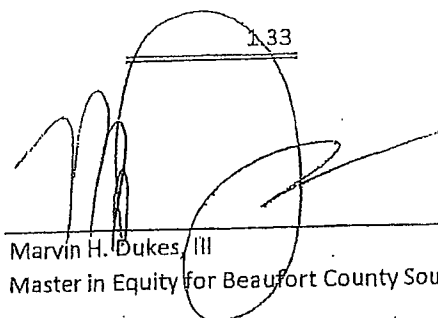

Marvin H. Dukes, III
Master in Equity for Beaufort County South Carolina



EXHIBIT "B"

All that certain piece, parcel or lot of land situate, lying and being on Daufuskie Island, Beaufort County, South Carolina, known and described as Lot Number Fifty-Five (55) Daufuskie Island Club, Phase I, Bloody Point, and being more particularly shown and described on a plat thereof recorded in the Beaufort County Records in Plat Book 37 at Page 12 and revised in Plat Book 50 at Page 101. For a more detailed description as to courses, metes and bounds, reference may be made to said plat of record.

This property is subject to all applicable covenants, conditions, restrictions, easements and/or rights-of-way filed of record in the Office of the Register of Deeds for Beaufort County, South Carolina, including, but not limited to those certain Declaration of Covenants, Conditions and Restrictions for the Daufuskie Island Club Homesites, dated October 26, 1989 and recorded in the Beaufort County Records in Deed Book 539 at Page 1350, as amended.

This being the same property conveyed unto William A. Ashton, Jr., M.D. and Michele C. Ashton by Deed of North American Telecom, Ltd., dated June 6, 2001 and recorded June 12, 2001 in the Office of the Register of Deeds for Beaufort County, South Carolina in Record Book 1431 at Page 32.

TMS #: R800 027 00A 0055 0000

F:\CLIENT\B\BLOODYPOINT\COLLECTIONS\ASHTON\PLEADINGS\MASTER'S REPORT OF SALE.DOC

4
10 PB
JIP
28115

Finger & Fraser, P.A.
Attorney(s) At Law
P.O. Box 24005
Hilton Head Island, S.C. 29925-4005

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

BEAUFORT COUNTY SC - ROD
BK 03111 PGS 1291-1294
FILE NUM 2012001529
01/11/2012 11:10:05 AM
REC'D BY P BAXLEY RCPT# 665490
RECORDING FEES 10.00
County Tax 9.90
State Tax 0.00

MASTER IN EQUITY DEED

TO WHOM THESE PRESENTS SHALL CONCERN:

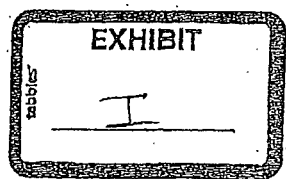
LAST TITLEHOLDER: WILLIAM A. ASHTON, JR. AND MICHELE C. ASHTON

I, Marvin H. Dukes, III, as Master In Equity for Beaufort County, in the State of South Carolina, send greetings:

WHEREAS, in an action in the Court of Common Pleas in Beaufort County (Civil Action No.: 2011-CP-07-02176) between Bloody Point Property Owners Association, Inc., as Plaintiff, and William A. Ashton, Jr. and Michele C. Ashton, as Defendants, the Master In Equity issued an Order dated December 2, 2011 giving Plaintiff judgment against the Defendants; and

WHEREAS, on January 3, 2012, after due advertisement of the said property for sale at public outcry, the property was openly and publicly, and after the manner of Auction, offered for sale and sold for the sum of Eight Thousand Eight Hundred and 00/100 Dollars (\$8,800.00), said sum being the highest amount bid at said sale and such bid having been made by David Fingerhut; and

NOW, KNOW, ALL MEN BY THESE PRESENTS that I, Marvin H. Dukes, III, Master In Equity for Beaufort County, pursuant to the foregoing and also in consideration of the said bid paid as aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release the following described property unto David L. Fingerhut and Patricia M. Santry, 63 Shipyard Drive, Apt. 905, Hilton Head Island, South Carolina, 29928, as joint tenants with rights of survivorship and not as tenants in common.



TO HAVE AND TO HOLD the said property, with its hereditaments, privileges and appurtenances, unto David L. Fingerhut and Patricia M. Santry, their successors and assigns, for their own use, benefit and behalf forever.

IN WITNESS WHEREOF, I, Marvin H. Dukes, III, as Master In Equity for Beaufort County, under and by virtue of the said Decree, have hereunto set my Hand and Seal this 6 day of January in the year of our Lord Two Thousand and Twelve and in the Two Hundred and Thirty-Fifth year of the sovereignty and independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Handwritten signature
PRST

Handwritten signature
Marvin H. Dukes, III
Master In Equity for Beaufort County

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

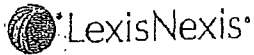
ACKNOWLEDGMENT

I, THE UNDERSIGNED Notary Public, do hereby certify that Marvin H. Dukes, III, Master In Equity for Beaufort County, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this the 6 day of January, 2012.

Handwritten signature
Notary Public for South Carolina
My Commission Expires: 3/29/2016

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Positive
As of: May 9, 2012 9:56 AM EDT

Arceneaux v. Arrington

Court of Appeals of South Carolina

November 14, 1984, Heard ; February 21, 1985, Decided

No. 0397

Reporter: 284 S.C. 500; 327 S.E.2d 357; 1985 S.C. App. LEXIS 300

Ray ARCENEUX, G. G. Case, Jr., and D. Clyde Spearman, Appellants, v. Jerry W. ARRINGTON, Respondent

Notice:

Prior History: [***1] Appeal From Oconee County, C. Victor Pyle, Jr., Judge

Disposition: Affirmed.

Core Terms

tract, laches, deed, restrictive covenant, subdivision, enquiry, rights, restrictions, metal

Case Summary

Procedural Posture

In their action alleging violations of restrictive covenants in a subdivision, plaintiff property owners appealed a judgment of the Circuit Court of Oconee County (South Carolina), which denied the owners' request for injunctive relief to prevent development developer from maintaining a metal building on his tract of land.

Overview

The developer's corporation developed the property and he recorded an instrument that imposed restrictive covenants, including prohibitions against the construction of metal buildings and commercial use of the property. The developer's personal tract was outside the area made subject to the restrictive covenants, but a clause in the deed of his tract made it subject to the restrictions. The owners sought to enjoin the developer from using the tract for non-residential use and to force him to remove the building. The trial court denied the injunctive relief on the basis that the owners were guilty of laches. The court affirmed. The owners admitted their prior knowledge of the developer's commercial use of his tract as it was used to house the corporation's sales office. The owners waited over two years after they knew or should have known that the restrictive covenants were being violated before bringing their action. Because the deed of the developer's tract stated that it was subject to the covenants, the owners were on notice and it was immaterial that the owners did not discover the restrictions in the deed until two years after the building was constructed.

EXHIBIT

J

284 S.C. 500, *500; 327 S.E.2d 357, **357; 1985 S.C. App. LEXIS 300, ***1

Outcome

The court affirmed the judgment of the trial court, which denied the owners' request for injunctive relief to enjoin the developer from violating restrictive covenants and maintaining a metal building on his tract.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches
Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

If there has been unreasonable delay in asserting a claim, or if, knowing his rights, a party does not seasonably seek to avail himself of the means at hand for their enforcement, but suffers his adversary to incur expense or enter into obligations or otherwise change his position, then equity will ordinarily refuse to enforce those rights, especially if an injunction is asked. Whether the plaintiff is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party. Delay alone in the assertion of a right does not constitute laches.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview
Real Property Law > ... > Encumbrances > Restrictive Covenants > General Overview
Real Property Law > ... > Encumbrances > Restrictive Covenants > Subdivisions
Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

To charge a party with laches in the assertion of an alleged right, he must have knowledge of the facts upon which he bases his claim. However, if the circumstances are such as to have put him upon enquiry and the means of ascertaining the truth were readily available had enquiry been made, the neglect of the party to make enquiry will charge him with laches the same as if he had known the facts.

Counsel: *Michael O. Hawkins*, Anderson, for appellants.

W. Jerry Fedder, of *Fedder, Derrick, Ritter & Williams*, Seneca, for respondent.

Judges: Bell, Justice. Sanders, C.J., and Gardner, J., concur.

Opinion by: BELL

Opinion

[*501] [**358] This is a proceeding in equity to enforce a restrictive covenant on real property. The circuit court denied the plaintiffs' prayer for mandatory injunctive relief. We affirm.

In 1965 Arrington acquired title to a 491.3 acre tract in Oconee County. He subsequently transferred title to the Port Bass Development Company, Inc., a company he incorporated for the purpose of subdividing and developing the property. Before deeding the land to the corporation, Arrington recorded an instrument entitled "Restrictions for Port Bass Subdivision," imposing restrictive covenants on part of the property. Among other things, these covenants [*502] prohibited metal buildings and "any use whatsoever for commercial purposes" in the restricted area.

From 1965 onward the sales office of the Development Company was located on Tract 11 of the Port Bass subdivision. [***2] Tract 11 is outside the area made subject to the original restric-

284 S.C. 500, *502; 327 S.E.2d 357, **358; 1985 S.C. App. LEXIS 300, ***2

tive covenants. In 1967 Arrington incorporated a water company, Water Systems, Inc., to serve the subdivision. The water company's facilities and a well drilling business were also located on Tract 11.

Between 1965 and 1982, the Development Company made twenty to twenty-five conveyances of property within the Port Bass subdivision. As the Development Company sold lots outside the restricted area but within the subdivision, Arrington included a clause in the deeds making the lots "subject to" the original restrictions. Arrington's wife, the secretary of the Development Company, prepared all the deeds. She is not an attorney; she simply copied the form of previous deeds.

On March 26, 1979, the Development Company conveyed Tract 11 to Arrington personally. Arrington recorded the deed in the office of the clerk of court the following day. The deed contains a clause making Tract 11 "subject to" the original restrictive covenants. Arrington claims the restrictions were copied into the deed by mistake.

In the spring of 1979, Arrington constructed a large prefabricated metal building on Tract 11 to house the water [***3] company and the well drilling business. The building cost approximately \$ 65,000 to construct. It is clearly visible to anyone entering the subdivision.

In September 1981, Arceneaux, Case, and Spearman (the Plaintiffs), each of whom owns property in the subdivision, commenced this action, alleging violations of the restrictive covenants. They asked the court to enjoin Arrington from using Tract 11 for any purpose other than residential and to have him remove the metal building or veneer it with brick or wood. Arrington answered, denying the restrictive covenants apply to Tract 11 and raising the affirmative defense of laches. The circuit court found the Plaintiffs guilty of laches and entered judgment for Arrington.

If there has been unreasonable delay in asserting a claim, or if, knowing his rights, a party does not [*503] seasonably seek to avail himself of the means at hand for their enforcement, but suffers his adversary to incur expense or enter into obligations or otherwise change his position, then equity will ordinarily refuse to enforce those rights, especially if an injunction is asked. Archambault v. Sprouse, 215 S.C. 336, 55 S.E. (2d) 70, 12 A.L.R. (3d) 388 (1949). [***4] Whether the plaintiff is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party. Privette v. Garrison, 235 S.C. 119, 110 S.E. (2d) 17 (1959). Delay alone in the assertion of a [***359] right does not constitute laches. Grossman v. Grossman, 242 S.C. 298, 130 S.E. (2d) 850 (1963).

In this case, the Plaintiffs readily admit their prior knowledge of the commercial use of Tract 11. Arceneaux, who purchased his lot in 1977, testified he knew the trailer originally placed on Tract 11 in 1965 housed the Development Company's sales office and the water company office. He also knew the lot had been used to store supplies and construction equipment. Case, who purchased his property in 1969, stated he was aware Tract 11 had always been a commercial lot. He saw the metal building being constructed in the spring of 1979. Spearman did not testify.

These circumstances are sufficient to support the circuit court's finding [***5] of laches. The Plaintiffs waited over two years after they knew or should have known the restrictive covenants were being violated to assert their rights. They suffered Arrington to incur the expense of erecting the metal building without protest. It would be unjust to permit them now to enforce their claimed rights against him.

The Plaintiffs concede they delayed in bringing suit, but argue the delay was caused by Arrington's failure to disclose the restrictions placed on Tract 11 in March 1979. They contend there

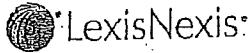
284 S.C. 500, *503; 327 S.E.2d 357, **359; 1985 S.C. App. LEXIS 300, ***5

was no visible change which would have put them on notice that Tract 11 had been sold to Arrington subject to the restrictive covenants. Because they did not know of their rights, they argue, the delay in commencing suit was not unreasonable.

We are not persuaded. The general rule is that to charge a party with laches in the assertion of an alleged right, he must have knowledge of the facts upon which he bases his claim. [*504] However, if the circumstances are such as to have put him upon enquiry and the means of ascertaining the truth were readily available had enquiry been made, the neglect of the party to make enquiry will charge him with laches the same [***6] as if he had known the facts. Stoke v. Wheeler, 391 Ill. 429, 63 N.E. (2d) 492 (1945); cf. Black v. Childs, 14 S.C. 312 (1880). The restrictive covenants were clearly referenced in the deed conveying the property from the Development Company to Arrington. That deed was recorded on March 27, 1979. A party is deemed to have notice of a deed and its contents from the date it is recorded. Godbold v. Lambert, 29 S.C. Eq. (8 Rich. Eq.) 155 (1856). At the latest, the circumstances were such as to put the Plaintiffs on enquiry notice concerning restrictions on Tract 11 when Arrington began constructing the metal building in the spring of 1979. It is immaterial that they may not actually have discovered the restrictions in Arrington's deed until 1981.

For the reasons stated, the judgment of the circuit court is

Affirmed.



Neutral

As of: May 9, 2012 9:56 AM EDT

Barr v. Allen (In re Barr)

United States Bankruptcy Court for the Eastern District of New York

August 11, 1994, Decided

CASE NO. 193-16528-260, CHAPTER 13, ADVERSARY PROCEEDING NO. 193-1537-260

Reporter: 170 B.R. 772; 1994 Bankr. LEXIS 1677

In re: JACOB L. BARR, Debtors. JACOB L. BARR, Plaintiff, v. WILLIAM G. ALLEN a/k/a JERRY ALLEN, Defendant.

Notice:

Core Terms

mortgage, foreclosure sale, foreclosure, summary judgment, material fact, adversary proceedings, equivalent value, foreclosure law, inadequacy, advertised, fraudulent, genuine, deed, proceedings, conscience, shock, bid

Case Summary

Procedural Posture

Defendant creditor filed a motion for summary judgment in connection with an adversary proceeding arising out of and relating to plaintiff debtor's filing of a third petition for relief under Chapter 13. The creditor had answered the debtor's complaint with a denial that the debtor had any interest at all in the subject property at the commencement of the Chapter 13 case.

Overview

As an initial matter, the court noted that contrary to the debtor's assertions, the record indicated that the debtor had been served with notice of the state foreclosure action and the resulting sale. The remaining issue involved a determination of whether the foreclosure sale was a fraudulent transfer pursuant to 11 U.S.C.S. § 548, in which case, the debtor would have had an interest in the property in question. Thus, the disposition of the case depended upon whether the foreclosure sale was accordant procedurally and substantively with the applicable state foreclosure law. The decree of foreclosure conclusively established that a procedurally correct judicial sale had occurred. Moreover, as the sale was procedurally correct, a mere inadequacy of the foreclosure price was no basis for setting the sale aside, particularly as it failed to be so low as to shock the conscience or raise a presumption of fraud or unfairness. The court therefore granted the motion for summary judgment.

Outcome

The court granted the creditor's motion for summary judgment and dismissed, with prejudice, the debtor's adversary proceeding regarding the parties' interests in the subject property.

170 B.R. 772, *772; 1994 Bankr. LEXIS 1677, **1677

LexisNexis® Headnotes

Bankruptcy Law > Estate Property > Contents of Estate

Pursuant to 11 U.S.C.S. § 541(a)(1), the commencement of a bankruptcy case creates an estate comprised of, among other things, all legal or equitable interests of the debtor in property as of the commencement of the case.

Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > Constructively Fraudulent Transfers
 Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > Elements
 Real Property Law > Transactions > Purchase & Sale > Fraudulent Transfers
 Real Property Law > Transactions > Bankruptcy > Sales
 Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > General Overview

Under 11 U.S.C.S. § 548(a)(2), a foreclosure sale may be a fraudulent transfer, and therefore avoided, if it occurred within one year of the filing of the bankruptcy petition, less than a reasonably equivalent value was received for the transfer, and the debtor was insolvent on the date of the transfer or rendered insolvent thereby.

Civil Procedure > Judgments > Summary Judgments > General Overview
 Civil Procedure > ... > Summary Judgments > Entitlement as Matter of Law > Genuine Disputes
 Bankruptcy Law > Procedural Matters > Adversary Proceedings > Judgments
 Civil Procedure > ... > Summary Judgments > Evidentiary Considerations > Scintilla Rule
 Civil Procedure > ... > Summary Judgments > Entitlement as Matter of Law > Materiality of Facts
 Civil Procedure > ... > Summary Judgments > Opposing Materials > General Overview
 Civil Procedure > ... > Summary Judgments > Motions for Summary Judgment > General Overview
 Civil Procedure > ... > Summary Judgments > Entitlement as Matter of Law > Appropriateness
 Civil Procedure > Judgments > Summary Judgments > Evidentiary Considerations
 Civil Procedure > ... > Summary Judgments > Entitlement as Matter of Law > General Overview

Fed. R. Civ. P. 56, made applicable to bankruptcy proceedings pursuant to Fed. R. Bankr. P. 7056, provides that summary judgment shall be rendered if the pleadings and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). When determining whether there is a genuine issue of material fact, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Without sufficient evidence for a finder of fact to find in favor of the non-moving party, there is no issue for trial. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Thus, a motion for summary judgment although denied when there are genuine issues as to any material fact, must be granted when there is no such issue and the movant is entitled to judgment as a matter of substantive law.

Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > General Overview

Pursuant to § 548 of the Bankruptcy Code, 11 U.S.C.S. § 548, a trustee or debtor may avoid a transfer if, inter alia, the debtor received less than reasonably equivalent value in exchange for such transfer. 11 U.S.C.S. § 548(a)(2)(A).

Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > General Overview
 Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > Value
 Real Property Law > Transactions > Bankruptcy > Sales

A fair and proper price or a "reasonably equivalent value" for foreclosed property for purposes

170 B.R. 772, *772; 1994 Bankr. LEXIS 1677, **1677

of 11 U.S.C.S. § 548 is the price in fact received at the foreclosure sale, so long as there has been compliance with all the requirements of the state's foreclosure law.

Civil Procedure > Judicial Officers > Masters > Appointment of Masters
 Real Property Law > ... > Financing > Foreclosures > General Overview
 Civil Procedure > Judicial Officers > References
 Civil Procedure > Judgments > Entry of Judgments > General Overview
 Civil Procedure > Judicial Officers > Magistrates > General Overview
 Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens
 Civil Procedure > Judicial Officers > Referees > Appointment of Referees

Judicial real estate mortgage foreclosure sales in South Carolina are governed procedurally by S.C. R. Civ. P. 71 (1991). This rule empowers the appointed master or referee to determine the total debt and direct the sale of the property by describing the parcel, fixing the necessary legal advertisement, setting the time and location of the sale, giving notice of any senior liens, taxes or any other encumbrances, and specifying the amount and due date of the good faith deposit required as earnest money. After the sale, the referee must then execute the deed to the purchaser and disburse the proceeds.

Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > General Overview
 Real Property Law > ... > Financing > Foreclosures > General Overview
 Real Property Law > Transactions > Purchase & Sale > Fraudulent Transfers

When the sale is procedurally correct, it is "black letter" law that mere inadequacy of the foreclosure sale price is no basis for setting the sale aside, though it may be set aside (under state foreclosure law, rather than fraudulent transfer law) if the price is so low as to shock the conscience or raise a presumption of fraud or unfairness. It is well settled in South Carolina that inadequacy of price unless it is so gross as to shock the conscience, or accompanied by other circumstances warranting the interference of the court, is not enough to move the court to set aside a sale fairly made.

Counsel: [*1] GLASSER & ROSSI, ESQS., Attorneys for the Debtor, New York, NY,
 BY: SHEILA M. ROSSI, ESQ.

REAVES & MOORE, ESQS., Attorneys for the Defendant, Florence, SC, BY: GEORGE G.
 REAVES, ESQ.

Judges: DUBERSTEIN

Opinion by: CONRAD B. DUBERSTEIN

Opinion

[*773] DECISION ON MOTION FOR SUMMARY JUDGEMENT

CONRAD B. DUBERSTEIN, Chief Bankruptcy Judge

This adversary proceeding arises out of and relates to this Chapter 13 case filed by Jacob L. Barr ("Barr" or "Debtor" or "Plaintiff-Debtor") on July 26, 1993. The Chapter 13 Trustee's motion to dismiss the case was granted at a hearing held before this Court on May 11, 1994. The order granting the motion was signed on July 6, 1994. It provided for the Debtor's right to convert the case to a Chapter 7 within fifteen days from the date of the entry of the order. The Debtor

170 B.R. 772, *773; 1994 Bankr. LEXIS 1677, **1

did not convert his Chapter 13 case by July 21, 1994, the time period permitted by the order, and it was deemed dismissed. Because of the pendency of the instant adversary proceeding initiated in that case, it was not closed by the Clerk of this Court.

Notwithstanding the foregoing facts, on June 9, 1994, Barr filed a second petition for relief under Chapter 13 of the Code. The Chapter 13 Trustee's motion to dismiss [**2] that case was granted at a hearing held before this Court on July 27, 1994. An order granting the motion was presented for settlement and signed on August 10, 1994. Like the order entered dismissing Barr's prior petition, it provided for his right to convert the case to a Chapter 7 within fifteen days from the date of the entry of the order. Such time period has not yet expired. However, on August 9, 1994, Barr filed a third petition for relief under Chapter 13 which the Clerk accepted for filing.

FACTS

In February of 1989 Plaintiff-Debtor Jacob L. Barr purchased a parcel of land in Florence County, South Carolina from defendant, William G. Allen ("Allen" or "Defendant"), for approximately \$ 156,000. Barr paid \$ 75,000 cash and assumed an existing mortgage of approximately \$ 38,000 held by Middlesex Federal Savings and Loan Association and serviced by First Citizens Mortgage Corporation ("First Citizens Mortgage"). Additionally, Barr gave Allen a note ("the Note") for the balance (\$ 38,201.34). The Special Referee in a Decree of Foreclosure entered in an action initiated by Allen, hereinafter discussed, found that a mortgage securing the Note was filed in the office of the Clerk for [**3] Florence County, South Carolina on June 7, 1989, creating a second lien on the property.

The Note fell due on June 7, 1992. When Barr failed to satisfy the debt, the parties agreed to extend the due date to December 30, 1992. In July of 1992, Barr paid \$ 22,000 to Allen towards the satisfaction of the Note. However, Barr did not fulfill his obligation [**774] by the extended due date and Allen subsequently initiated the foreclosure action in Florence County on January 11, 1993. Barr failed to answer the complaint in the action which resulted in a default.

The Special Referee, after a hearing, issued the Decree of Foreclosure, dated April 20, 1993, ordering the sale of the subject property by public auction. The Decree contained the Special Referee's conclusions of law and findings of fact, which included that:

- (1) Both Barr and Middlesex Federal Savings and Loan Association were served and notified of the time, place, and date of the hearing;
- (2) The Note executed by Barr in favor of Allen was secured by a mortgage thereby creating a second lien on the subject property, as hereinabove noted; and
- (3) The total debt due Allen was fixed at \$ 41,446.23 inclusive of interest.¹

[**4] Documents submitted to this Court by the Plaintiff and Defendant reflect the following:

Pursuant to the laws of the State of South Carolina, the property was sold at public auction on July 7, 1993, resulting in the sale of the property to Allen, the highest bidder, for \$ 500. The bid

¹ This total took into account the \$ 22,000 paid by Barr in July of 1992, interest accrued, both attorney and Referee's fees, and all costs of collection prior to the hearing.

was subject to the First Citizens Mortgage in the amount of \$ 30,882.70,² Florence County taxes, and assessments. Allen's bid took into account the balance due to him on the Note which was fixed at \$ 41,446.23 on the date of the Decree of Foreclosure, plus interest at the statutory rate of 14% thereafter. Thus, in essence, Allen's bid in the aggregate amounted to \$ 500 plus the additional sum of approximately \$ 72,000 due under the mortgages.

The deed was executed and [**5] delivered transferring title to Allen on July 20, 1993. Less than one week later, Barr filed this Chapter 13 case.

The Adversary Proceeding

On December 3, 1993, Barr commenced the instant adversary proceeding against Allen (1) to avoid the transfer of the property; (2) to declare the equity in the land as part of the bankruptcy estate; (3) ordering that title be transferred to Barr subject to any liens; (4) ordering the property to be turned over to a trustee in the related bankruptcy case; and (5) granting any other appropriate relief.

Allen answered the complaint denying that Barr had any interest at all in the property as of the commencement of the Chapter 13 case and subsequently moved this Court for summary judgment as to the same. He argues that the matter can be disposed of as a matter of law because the judicial sale completely divested Barr's interest in the property six days prior to the filing of his petition for relief. In support of his motion Allen maintains that because Barr had neither a legal nor an equitable interest in the property when his bankruptcy case was commenced, the property is not property of the bankruptcy estate pursuant to section 541 of the Bankruptcy Code [**6].³

In opposition to Allen's motion, Barr maintains that there are material factual disputes which render summary judgment inappropriate. According to Barr, the litigable facts are:

- (1) whether the Note was secured by a mortgage;
- (2) whether the foreclosure sale was procedurally proper, non-collusive and properly advertised;
- (3) whether all commercially reasonable steps were taken to secure the highest bidder;
- (4) whether the transfer of the property was fraudulent pursuant to section 548 of the Code;⁴ and
- (5) whether the deed was properly transferred.⁵

Barr maintains that he was neither served nor notified of the hearing in the state court foreclosure action nor of the sale, and claims that the auction was not properly advertised. However, Allen demonstrated, through supporting affidavits, and the Decree of Foreclosure that Barr was

² As of August 9, 1993 the amount due on the mortgage was \$ 30,882.70, according to a Proof of Claim filed with this Court by First Citizens. Additionally, Mr. Allen assumed the mortgage on August 11, 1993 and paid \$ 29,146.35 on February 25, 1994, satisfying the debt.

³ Pursuant to section 541, the commencement of a bankruptcy case creates an estate comprised of, among other things, all legal or equitable interests of the debtor in property as of the commencement of the case, 11 U.S.C. § 541(a)(1).

⁴ Under section 548, a foreclosure sale may be a fraudulent transfer, and therefore avoided, if it occurred within one year of the filing of the bankruptcy petition, less than a reasonably equivalent value was received for the transfer, and the debtor was insolvent on the date of the transfer or rendered insolvent thereby, 11 U.S.C. § 548(a)(2). See "Section 548 Issue" hereinafter set forth.

⁵ In raising this issue, Barr points to three payments he made to, and that were accepted by, the first mortgagee after the deed was transferred to Allen. See *infra* note 8 and accompanying text.

170 B.R. 772, *775; 1994 Bankr. LEXIS 1677, **6

served and the property was duly advertised for public sale.⁶ Barr also alleges that he believed he had more time to pay the debt and that he paid \$ 10,000 to Allen against the Note in May of 1993, after the Decree of Foreclosure. However, both of these allegations are unsupported.

[**8] The market value of the property, as computed by First Citizens, was deemed to be \$ 180,400.⁷ The affidavit of the Special Referee sworn to on January 12, 1994, submitted to this Court states that "after due notice and after publication required by statute, [he] conducted a judicial sale of the property on July 7, 1993. No deficiency was requested."

Despite Allen's assumption of the First Citizens Mortgage, Barr claimed that he made three mortgage installments, corroborated by cancelled checks,⁸ to First Citizens from August 2, 1993 through December 17, 1993.

[**9] DISCUSSION

Rule 56 of the Fed. R. Civ. P., made applicable to bankruptcy proceedings pursuant to Fed. R. Bankr. P. 7056, provides that summary judgment shall be rendered if the pleadings and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

When determining whether there is a genuine issue of material fact, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962)), cert. denied, 481 U.S. 1029 (1987); Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986), cert. denied, 480 U.S. 932, 94 L. Ed. 2d 762, 107 S. Ct. 1570 (1987). Without sufficient evidence [**10] for a finder of fact to find in favor of the non-moving party, there is no issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50 (citations omitted). Thus, a motion for summary judgment although denied when there are genuine issues as to any material fact, must be granted when there is no such issue and the movant is entitled to judgment as a matter of substantive law. Id. at 247-51; [**776] Rattner v. Netburn, 930 F.2d 204, 209 (2d Cir. 1991); Kenston Mgt. Co. v. Lisa Realty Co. (In re Kenston Mgt. Co.), 137 Bankr. 100, 108 (Bankr. E.D.N.Y. 1992).

In the instant matter, despite Barr's assertion of the above listed factual issues, the papers, supporting affidavits, and the findings of fact and conclusions of law contained in the Decree of Foreclosure all submitted to this [**11] Court, and the related proceedings held before this Court, clearly establish the facts surrounding the foreclosure sale and that the Note was secured by a mortgage. Thus, there are no issues of material fact requiring trial. The remaining issue of whether the foreclosure sale was a fraudulent transfer pursuant to section 548 of the Code is a matter of sub-

⁶ See Affidavit of James R. Bell, Esq., sworn to January 10, 1994 (Allen's attorney of record in the foreclosure action); Affidavit of James A. Nelson, Special Referee, sworn to January 12, 1994; Affidavit of Susan Collins, sworn to July 2, 1993 (Legal Clerk for The Florence Morning News); and Decree of Foreclosure, so ordered April 20, 1993. According to the Affidavit of Susan Collins, a Notice of Sale of the property was published in the Florence Morning News on June 18, 1993, June 25, 1993, and July 2, 1993.

⁷ The appraisal's accuracy has been questioned, without support, by Allen who believes the land is worth less than the First Citizens's assessment.

⁸ At a hearing before this Court Barr proffered three cancelled checks payable to First Citizens Mortgage Corp. of South Carolina: #151 in the amount of \$ 560 dated August 2, 1993, #156 in the amount of \$ 560 dated September 12, 1993, and #171 in the amount of \$ 582.40 dated December 17, 1993. Thus, Barr may have a cause of action against the Bank to recover the money paid during the time when he no longer owned the property.

stantive law.

The Section 548 Issue

Pursuant to section 548 of the Bankruptcy Code, a trustee or debtor may avoid a transfer if, *inter alia*, the debtor received "less than reasonably equivalent value in exchange for such transfer." 11 U.S.C. § 548 (a)(2)(A). For some time the appropriate definition of "reasonably equivalent value" had been heavily disputed in the Circuit Courts.⁹ However, the Supreme Court recently settled the issue in holding that:

[A] fair and proper price or a "reasonably equivalent value" for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the state's foreclosure law have been complied with.

BFP v. Resolution Trust Corp., 128 L. Ed. 2d 556, U.S. , 114 S. Ct. 1757, 1764 (1994).

[**12] Therefore, the disposition of the case will depend on whether the foreclosure sale *sub judice* was accordant procedurally and substantively with applicable South Carolina state foreclosure law.

[**13] Judicial real estate mortgage foreclosure sales in South Carolina are governed procedurally by Rule 71 of the South Carolina Rules of Civil Procedure. This statute empowers the appointed Master or Referee to determine the total debt and direct the sale of the property by describing the parcel, fixing the necessary legal advertisement, setting the time and location of the sale, giving notice of any senior liens, taxes or any other encumbrances, and specifying the amount and due date of the good faith deposit required as earnest money. After the sale, the Referee must then execute the deed to the purchaser and disburse the proceeds. S.C. R. of Civ. Proc. Rule 71 (1991).

The Decree of Foreclosure so ordered by the Special Referee conclusively establishes that a procedurally correct judicial sale was to be scheduled. Furthermore, the supporting affidavits proffered by Allen reveal that Barr was served, the sale was duly advertised, Allen was the highest bidder, and the Special Referee executed the deed transferring title to Allen on July 20, 1993. Therefore, it appears from the record before this Court that the judicial sale was, in all respects, consistent with South Carolina procedural [**14] foreclosure law.

The only issue with respect to substantive South Carolina foreclosure law is the possibility that the purchase price could be deemed inadequate. "Some [states] forbid the property to be sold for less than a specified fraction of a mandatory presale fair-market-value appraisal." BFP, U.S. at , 114 S. Ct. at 1763. When the sale is procedurally correct,

It is "black letter" law that mere inadequacy of the foreclosure sale price is no basis for setting the sale aside, though it may be set aside (under state foreclosure law, rather than fraudulent transfer law) if [**777] the price is so low as to 'shock the conscience or raise a presumption of fraud or unfairness.'

⁹ The Fifth Circuit in Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201, 204 (5th Cir. 1980) (setting aside a mortgage foreclosure sale that yielded 57% of the property's fair market value) opined, *in dicta*, that a sale yielding less than 70% of the fair market value should be invalidated. *But see Bundles v. Baker (In re Bundles)*, 856 F.2d 815, 825 (7th Cir. 1988) (rejecting the "Durrett Rule" and adopting a case by case approach with a rebuttable presumption that the price was sufficient under 548(a)(2)); Lawyers Title Ins. Corp. (In re Madrid), 21 Bankr. 424, 427 (Bankr. 9th Cir. 1982) (holding that foreclosure sales should not be set aside unless there is a defect in the sale's procedure, such as fraud, which would account for the inadequacy of the sale price), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir. 1984), *cert. denied*, 469 U.S. 833, 83 L. Ed. 2d 66, 105 S. Ct. 125 (1984).

170 B.R. 772, *777; 1994 Bankr. LEXIS 1677, **14

Id.

It is well settled in South Carolina that "inadequacy of price unless it is so gross as to shock the conscience, or accompanied by other circumstances warranting the interference of the court, is not enough to move the court to set aside a sale fairly made." Poole v. Jefferson Standard Life Ins. Co., 174 S.C. 150, 177 S.E. 24, 27 (S.C. 1934) (quoting Bonham v. Cave, 102 S.C. 308, 86 S.E. 681, 682 (S.C. 1915)). [****15**] Accord Bennett v. Floyd, 237 S.C. 64, 115 S.E.2d 659, 664 (S.C. 1960); Singleton v. Mullins Lumber Co., 234 S.C. 330, 108 S.E.2d 414, 424 (S.C. 1959); Howell v. Gibson, 208 S.C. 19, 37 S.E.2d 271, 274-275 (S.C. 1946); Federal Nat'l Mortgage Assoc. v. Brooks, 304 S.C. 506, 405 S.E.2d 604, 605 (S.C. Ct. App. 1991); Investors Savs. Bank v. Phelps, 303 S.C. 15, 397 S.E.2d 780 (S.C. Ct. App. 1990).

As set forth above, although the subject property may well have been purchased for less than its appraised value, inadequacy of price in and of itself is not sufficient to set aside the foreclosure sale. The consideration paid in the aggregate included: the \$ 500 bid at the sale; the First Citizens Mortgage in the amount of \$ 30,882.70, Florence County taxes, and assessments, which the property purchased was subject to; and the amount of the Note, which was fixed at \$ 41,446.23 on the date of the Decree of Foreclosure, plus interest at the statutory rate of 14% thereafter. [****16**] Therefore, inasmuch as Allen's bid in the aggregate amounted to \$ 500 plus the additional sum of approximately \$ 72,000 due under the mortgages, any inadequacy in the price paid for the property was not "so gross as to shock the conscience, or accompanied by other circumstances warranting the interference of the court." Poole, 177 S.E. at 27.

Thus, based on the foregoing, Allen's motion for summary judgment is granted and the instant adversary proceeding is dismissed with prejudice.

CONCLUSION

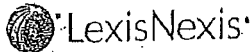
1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157(a) and it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(h).
2. Allen's motion for summary judgment is granted and the instant adversary proceeding is dismissed with prejudice.
3. The Clerk is directed to close the adversary proceeding numbered 93-1537-260.

SUBMIT AN ORDER CONSISTENT WITH THIS OPINION

Dated: Brooklyn, New York

August 11, 1994

CONRAD B. DUBERSTEIN, CHIEF BANKRUPTCY JUDGE



Neutral

As of: May 9, 2012 9:53 AM EDT

Bennett v. Floyd

Supreme Court of South Carolina

August 3, 1960, Decided

17691

Reporter: 237 S.C. 64; 115 S.E.2d 659; 1960 S.C. LEXIS 81

Edwina BENNETT, Smith Bradshaw, Mary Lee Patterson, Sam Mouzon, Estelle Mack, Horton Mack, Sue Mack, Tarbell Mack, Bertha Middleton, Ethel Boyd, Charles Bennett, Mary Bennett, Frank Bennett, George Bennett, Louise Bennett and Susie Bennett, Appellants, v. G. T. FLOYD and Henry Roe, representing the unknown heirs, next of kin, administrators, executors and assigns of E. B. Rhodus, Respondents.

Notice:

Prior History: [***1] Action by heirs of former owner of 269-acre tract of land questioning validity of partition action and judicial sale by which heirs had been divested of their interest. On exceptions to the report of a referee, the Court of Common Pleas, Clarendon County, James Hugh McFaddin, J., confirmed report of referee and heirs appealed. The Supreme Court, Oxner, J., held that where no evidence was adduced as to the actual value of property when it was sold to purchaser for \$ 100.00, evidence was insufficient to establish fraud or collusion overthrowing the sale, or to overcome the presumption of validity of such judicial sale.

Affirmed.

Disposition: Affirmed.

Core Terms

heirs, partition, tract, parties, died, taxes, partition proceedings, remainder, circumstances, purchaser, allot, deed

Case Summary

Procedural Posture

Appellant heirs challenged a decision of the Court of Common Pleas, Clarendon County (South Carolina), which was in favor of respondents; the executrix and devisees of a purchaser of land, in the heirs' action to set aside a partition sale.

Overview

The land was sold at a judicial sale following a partition action. The purchaser's predecessor bought the land for \$ 100. Later, the heirs sought to set aside the sale. The trial court found for re-

237 S.C. 64, *64; 115 S.E.2d 659, **659; 1960 S.C. LEXIS 81, ***1

spondents, and the court affirmed. The court rejected the argument that all of the heirs were not served with process in the partition action. The court held that the affidavit of service contained in the record included all of the parties. The heirs failed to meet their burden of establishing by clear and convincing evidence that the affidavit of service was false. The heirs also did not prove that one of the heirs was living at the time of the suit and was thus not served because the record in the partition action showed that the heir had died before the suit was commenced. The court held that the price paid for the land was not grossly inadequate. If there was a conspiracy to lower the price, it was a vice that could not have been discovered by an examination of the record and, therefore, could not affect a bona fide purchaser. There was no evidence to sustain the allegation of fraud.

Outcome

The court affirmed.

LexisNexis® Headnotes

Real Property Law > Priorities & Recording > Elements > Bona Fide Purchasers
 Civil Procedure > Judgments > Enforcement & Execution > Writs of Execution
 Real Property Law > ... > Types of Property Estates > Transfers > Partition Actions
 Contracts Law > Types of Contracts > Bona Fide Purchasers
 Criminal Law & Procedure > ... > Assault & Battery > Simple Offenses > General Overview
 Criminal Law & Procedure > ... > Crimes Against Persons > Assault & Battery > General Overview

The purchaser in good faith at a judicial sale is bound only to see that the court had jurisdiction of the subject of the action and of the parties in interest. He is not affected by irregularities or errors in the record for which the judgment might have been vacated in a direct attack, or reversed on appeal, or by secret vices affecting the judgment, which are not disclosed by examination of the record. Sound public policy requires that the solemn judgments of the courts and rights acquired thereunder be sustained against collateral assault, if in reason and justice it can be done.

Real Property Law > ... > Types of Property Estates > Concurrent Ownership > General Overview
 Civil Procedure > Preliminary Considerations > Equity > General Overview
 Real Property Law > ... > Types of Property Estates > Transfers > Partition Actions

A court of equity under proper circumstances may allot a part of land subject to a partition action to one co-tenant and order the remainder sold for division among the other co-tenants. A court in the exercise of its inherent equitable power may decree, where practicable and where no prejudice will result to the owners, a partial partition in kind by allotting to one of the owners one of several tracts, or a part of a single tract, in satisfaction of his share, and order a partition by sale of the remainder of the single tract, or of the other tracts, with a division of the sale proceeds among the other owners in satisfaction of their respective shares.

Civil Procedure > Judgments > Enforcement & Execution > Writs of Execution

Inadequacy of price, unless so gross as to shock the conscience of the court or accompanied by circumstances from which fraud may be clearly inferred, will not justify the overthrow of a judicial sale.

Headnotes/Syllabus

Headnotes

1. JUDICIAL SALES.--A purchaser in good faith at a judicial sale is bound only to see that the court rendering judgment under which sale was effected had jurisdiction of the subject of the action and of the parties in interest, and he is not affected by irregularities or errors in the record for which the judgment might have been vacated in a direct attack, or reversed on appeal, or by secret vices affecting the judgment, which are not disclosed by examination of the record.

2. JUDICIAL SALES.--Where record of a judicial sale and affidavit of service in connection with such sale show that necessary parties to sale have been served, the burden is on one questioning validity of sale to establish by clear and convincing evidence that affidavit of service is false.

3. PARTITION.--Evidence in action in which validity of a prior partition sale was questioned on the grounds that certain parties had not been properly served in the prior action, did not meet the required quantum of proof to overcome the effect of the record in the prior action containing an affidavit of service showing the parties to have been served and showing that a guardian *ad litem* had been appointed for such parties.

4. TRIAL.--Where judgment roll in prior action was offered in evidence without qualification or restriction, contents of judgment roll were treated as admitted generally, as applicable to any issue contents tended to prove, and the contents thereof were available to either party in instant action.

5. PARTITION.--Where record in prior partition action contained testimony that one of heirs of former owner of property involved was dead at the time of action, and where judgment roll in that action was offered into evidence in instant action in which validity of the judicial sale following partition was being challenged on the grounds that heir was not dead at the time of prior partition action and had not been served, testimony in former action could properly be considered, and was sufficient to support finding that heir was already dead when parties to prior partition action had been served.

6. PARTITION.--A court of equity, where practicable, and where no prejudice will result to the owners, may decree a partial partition in kind by allotting to one of owners one of several tracts, or a part of a single tract, in satisfaction of his share and order a partition by sale of the remainder of single tract or of other tracts, with the division of the sale proceeds among the other owners in satisfaction of their respective shares.

7. PARTITION.--In action for partition of a 269-acre tract of land, it was within court of equity's inherent power to set aside 10 acres for certain of heirs of former owner and to direct that remainder of tract be sold at public auction for distribution to remaining heirs.

8. PARTITION.--Even if fraudulent collusion were present between parties in partition action resulting in a grossly inadequate price being paid at judicial sale following such action, such fraud could not affect a *bona fide* purchaser at sale where conspiracy could not be discovered by an examination of the record and where price paid was not so grossly inadequate as to shock the conscience of the court.

9. JUDICIAL SALES.--The inadequacy of price paid at a judicial sale, unless so gross as to shock the conscience of the court or accompanied by circumstances from which fraud may be clearly inferred, will not justify the overthrow of sale.

10. PARTITION.--In action by heirs of former owner of 269-acre tract of land, attacking validity of a prior partition action and judicial sale, where no evidence was adduced as to the actual

237 S.C. 64, *64; 115 S.E.2d 659, **659; 1960 S.C. LEXIS 81, ***1

value of the property when it was sold to purchaser for \$ 100.00, evidence was insufficient to establish fraud or collusion overthrowing the sale or to overcome presumption of the validity of such sale.

Counsel: Elliott D. Turnage, Esq., of Darlington, for Appellants, cites: As to when the uncontradicted evidence, and the facts manifested by Judgment Roll 6939 are considered, the Court, in this action, should disregard, set aside, and hold for naught the Decree and Order of Sale in same, because of lack of jurisdiction, and fraud in obtaining same: 226 S.C. 366, 85 S.E.2d 279; 211 S.C. 223, 44 S.E.2d 442; 14 S.C. (Rice Eq.) 198; 18 S.C. 94; 93 N.C. 151; 47 C. J. 451, 128 C. J. S. 199; 17 S.C. 435; 40 S.C. 69, 18 S.E. 220; 23 S.C. 154; 25 S.C. 276; [***2] 88 S.C. 1, 70 S.E. 420; 217 S.C. 147, 60 S.E.2d 73; 185 S.C. 27, 192 S.E. 671; 199 S.C. 218, 19 S.E.2d 114; 24 S.C. 398; 106 S.C. 486, 91 S.E. 796; 116 S.C. 7, 106 S.E. 843; 178 S.C. 94, 182 S.E. 306; 199 S.C. 384; 1 S.E.2d 797; 108 S.E.2d 414. As to the defendants not being bona fide purchasers: 214 S.C. 212, 51 S.E.2d 753; 224 S.C. 452, 79 S.E.2d 871; 225 S.C. 303, 82 S.E.2d 183; 126 S.C. 180, 119 S.E. 186; 220 S.C. 10, 66 S.E.2d 327. As to the Statutes of Limitations being no bar to the plaintiffs' recovery in this action: 2 Rich. 627; 162 S.C. 177, 160 S.E. 437; 229 S.C. 29, 91 S.E.2d 88; 17 S.C. 35; 40 S.C. 435, 19 S.E. 79; 37 S.C. 369, 16 S.E. 42; 130 S.E. 477; 202 S.C. 129, 24 S.E.2d 164; 6 Rich. Eq. 96; 13 S.C. 37. As to Plaintiffs' rights not being barred by laches: 186 S.C. 155, 195 S.E. 239; 205 S.C. 377, 32 S.E.2d 147; 201 S.C. 447, 23 S.E.2d 362.

Messrs. Rogers & Riggs and John G. Dinkins, of Manning, for Respondent, cite: As to the Decree in Judgment Roll No. 6939 of Clarendon County being valid and Dependant a bona fide purchaser of the property involved: 234 S.C. 330, 108 S.E.2d 414; 76 S.C. 484; 89 S.C. 508; 31 S.C. 91. As to the Statutes of Limitations being [***3] a bar to relief in the present Action: 1 Am. Jur. 868, Adv. Poss., Sec. 132; 11 S.C. L. (2 Nott. & McC.) 343, 10 Am. Dec. 609; 82 S.C. 358, 64 S.E. 165; 59 S.C. 342, 37 S.E. 537; 112 S.C. 131, 99 S.E. 546; 95 S.C. 567, 77 S.E. 708.

Judges: OXNER, Justice, STUKES, C. J., and TAYLOR, LEGGE and MOSS, JJ., concur.

Opinion by: OXNER

Opinion

[*67] [**660] OXNER, Justice.

Appellants brought this action to recover a 269-acre tract of land in Clarendon County. It was formerly owned by James A. Bennett who died intestate about 1904. Appellants claim that as his sole heirs at law, title is now vested in them and they are entitled to possession. G. T. Floyd, now deceased who was the only material defendant, claimed that the property was partitioned in 1928 between the heirs of James A. Bennett and sold at public auction to the Logan-Robinson Fertilizer Company from which he purchased it in 1942 and immediately went into possession. In reply, appellants assailed the validity of the partition proceedings upon numerous grounds. A more detailed statement of the issues made by the pleadings will be made after tracing the chain of title since Bennett's death.

James A. Bennett was survived by a widow and [***4] nine children. His widow never remarried and died intestate. After his death several members of the family continued to reside on and farm this tract of land. In 1921 Washington Bennett, one of the sons, mortgaged his interest to

E. B. [**661] Rhodus to secure an indebtedness of \$ 384.10. Taxes for the year 1923, amounting to \$ 77.00, assessed in the name of the estate of [*68] James Bennett, became delinquent. To satisfy these taxes the property was sold by the Sheriff of Clarendon County at public auction in February, 1925 and bid in for \$ 97.70 by E. B. Rhodus. He received a tax deed from the Sheriff on March 3, 1926. Apparently Rhodus never sought to obtain possession under this conveyance. In 1927, Mallard Lumber Company, which had purchased the interest of several of the heirs, brought an action to partition the property. By that time some of the children of James Bennett had died, leaving in some instances minor children. Several of the heirs had left the State and their whereabouts were unknown. After his father's death, the interest of Washington Bennett was increased by inheritance from some of the heirs and by purchase from others, so that at the time the partition [***5] action was brought, he owned almost a half interest in the property. The interest of each of the other heirs was very small. Plaintiff in that action, Mallard Lumber Company, owned a 4/52 interest only. The non-resident heirs were served by publication and guardians *ad litem* duly appointed for the minors. Most of the adult defendants defaulted. At the hearing, E. B. Rhodus, who was a party to the partition proceedings, testified that nothing had been paid on the mortgage given him by Washington Bennett and further stated that he would make no claim of title under the tax deed if reimbursed for all taxes which he had paid. By agreement of all parties who had appeared, ten acres of the 269-acre tract were set aside by the Court to certain of the heirs as their share and the remainder ordered sold at public auction. At a sale held in November, 1928, the 269-acre tract, less the ten acres above mentioned, was bid in by Logan-Robinson Fertilizer Company for \$ 100.00 and the usual deed executed on November 20, 1928. Apparently Washington Bennett and his family remained on this farm although the record does not disclose under what arrangement. On December 4, 1942, Logan-Robinson Fertilizer [***6] Company, for a stated consideration of \$ 2,500.00, conveyed this land to G. T. Floyd. After this conveyance Washington Bennett continued to reside on the property [*69] but as a tenant of Floyd. Washington Bennett died in 1954. Thereafter his son, George Bennett, continued to rent the tract of land from Floyd. During the last few years there were also other tenants. Although George Bennett denied renting from Floyd, stating that he thought he was making payments on a mortgage, the overwhelming weight of the evidence is that Floyd took exclusive control of the property under a claim of ownership and was so recognized by Washington Bennett and later by his son George.

The instant suit by appellants was brought in January, 1959. Named as defendants were G. T. Floyd and the estate of E. B. Rhodus. However, it was conceded that the latter had no interest in the property, so that the action was in effect against G. T. Floyd alone. While this action was pending Floyd died and the executrix and devisees under his will were substituted as parties defendant.

In appellants' complaint the partition action was completely ignored and they sought only to set aside the tax deed to Rhodus. They [***7] asserted that Washington Bennett was an uneducated Negro who had been promised financial assistance by Rhodus and that a fiduciary relationship existed between them. They further alleged that Rhodus, in violation of his agreement to pay the taxes, permitted the property to be sold for delinquent taxes and bid it in himself. The tax sale was further attacked upon the ground that the property was improperly assessed in the name of the "Estate of James Bennett". In his answer, Floyd set up the partition proceedings and claimed that he was the *bona fide* purchaser from the Logan-Robinson Fertilizer Company. In addition he claimed title both by adverse possession and by prescription. A reply was filed by appellants in which they attacked the validity of the partition proceedings upon the grounds (1) [**662] that certain heirs were never served with the summons and complaint, (2) that one of the heirs, James Bradshaw, although living and a person *non compos mentis* at the time the action in partition was brought, was not made a party defendant, (3) that the Court was without jurisdiction to [*70] par-

237 S.C. 64, *70; 115 S.E.2d 659, **662; 1960 S.C. LEXIS 81, ***7

tion in kind a part of the property and sell the remainder; and (4) that [***8] the Mallard Lumber Company, Rhodus and Logan-Robinson Fertilizer Company conspired to divest the heirs of their title to the property and through fraudulent collusion permitted it to be sold for an inadequate and unconscionable price. Appellants further denied in their reply that Floyd was ever in possession of the property or held adversely.

The instant case was referred to a referee who after hearing the testimony found that all those having an interest in the property were made parties to the partition proceedings and duly served with process; that there was no proof of fraud; that the proceedings in partition were regular in every respect and binding on all the parties; and that Floyd through the conveyance from Logan-Robinson Fertilizer Company acquired good fee-simple title. He further found that Floyd and his predecessor in title had been in actual, open and notorious possession under a claim of ownership continuously for a period of thirty years from which a grant would be presumed, and that Floyd himself had been in actual, open and notorious possession under a claim of ownership for more than ten years, thereby establishing title by adverse possession. On exceptions by appellants, [***9] the case was heard by the circuit Judge who confirmed the report of the referee in all respects.

We are not concerned on this appeal with the validity of the tax deed to Rhodus for no one is asserting any title under it. It is respondents' claim that G. T. Floyd was a purchaser in good faith from Logan-Robinson Fertilizer Company which they say acquired title under a judgment rendered by a court that had jurisdiction of the subject matter and of all parties having an interest in the land sought to be partitioned. At the outset we are met with the rule that "the purchaser in good faith at a judicial sale is bound only to see that the court had jurisdiction of the subject of the action and of the parties in interest. He is not affected by irregularities or errors in the record for which [*71] the judgment might have been vacated in a direct attack, or reversed on appeal, or by secret vices affecting the judgment, which are not disclosed by examination of the record." Gladden v. Chapman, 106 S.C. 486, 91 S.E. 796, 797. The Court there further stated: "Sound public policy requires that the solemn judgments of the courts and rights acquired thereunder be sustained [***10] against collateral assault, if in reason and justice it can be done."

We will first discuss the contention of appellants that all of the heirs were not served with process. Although in appellants' reply it is claimed that five were not served, in their brief they refer to only three, namely, Washington Bennett, Rhetus July and Janie Lee July. The affidavit of service contained in the record includes all of these parties. This affidavit also shows service on the person with whom Rhetus July and Janie Lee July, both minors, resided and the judgment roll discloses that a guardian *ad litem* was appointed for them. Under these circumstances, the burden was on appellants to establish by clear and convincing evidence that this affidavit of service was false. In Singleton v. Mullins Lumber Co., 234 S.C. 330, 108 S.E.2d 414, 420, it was stated: "Due proof of service appears in the record of the foreclosure proceeding. Such a record, standing as it has for approximately half a century, may not be overthrown by less than the clearest and most convincing evidence. To hold otherwise would be a dangerous thing, imperiling titles to real estate and other rights long since adjudicated; [***11] it would, moreover, be contrary to precedent unbroken in the history of our jurisprudence. [**663] Even though proof of service were wholly lacking, it would be presumed that the court that rendered the judgment would not have done so without proper proof of service of the summons in the cause."

Appellants' testimony as to lack of service falls far short of meeting the required quantum of proof. It is largely negative in character and wholly unsatisfactory. The referee and circuit Judge were fully warranted in rejecting it. The exceptions relating to this question are overruled.

[*72] It is next contended that James Bradshaw, one of the heirs, was living at the time the partition action was instituted and was not made a party thereto. In support of this contention, ap-

237 S.C. 64, *72; 115 S.E.2d 659, **663; 1960 S.C. LEXIS 81, ***11

pellants offered two witnesses. One testified that James Bradshaw died in 1928. He was unable to fix the exact date but stated it was some time after March 28th. He admitted, however, that he was then only four years of age. The other testified that James Bradshaw died in June, 1928. Both of these witnesses were testifying from memory. No documentary proof was offered by appellants. This testimony is contradicted [***12] by that given in the partition proceeding which was to the effect that James Bradshaw died prior to the commencement of the action. The testimony in that proceeding can properly be considered in determining the factual issue now raised. The judgment roll in the partition suit was offered in evidence by appellants without qualification or restriction. Under these circumstances, it must be treated as admitted generally, as applicable to any issue it tended to prove, and the contents thereof available to either party to this action, Greenville County v. Stover, 198 S.C. 240, 17 S.E.2d 535; Arnold v. Life Insurance Co. of Georgia, 226 S.C. 60, 83 S.E.2d 553. The last mentioned evidence is fully sufficient to support the concurrent finding of fact by the referee and circuit Judge that James Bradshaw died prior to the commencement of that action. Apart from this, however, the contention now made by appellants is inconsistent with the stipulation between the parties in the instant case "that the heirs shown in the case of Mallard Lumber Company v. James Bennett et al. are all the heirs of James Bennett deceased."

The validity of the partition decree [***13] is assailed upon the ground that the Court was without power to allot to one tenant in common his share in kind and order a sale of the remainder. We find nothing in our statutes relating to partition denying such power. The Court's inherent equitable power therefore remains unimpaired. While we have found no case in this State passing precisely [*73] upon the question now under consideration, the general authority elsewhere is that a court of equity under proper circumstances may allot a part of the land to one co-tenant and order the remainder sold for division among the other co-tenants. In Swogger v. Taylor, 243 Minn. 458, 68 N.W.2d 376, 379, a wealth of authority is given in support of the statement that "the court in the exercise of its inherent equitable power may decree, where practicable and where no prejudice will result to the owners, a partial partition in kind by allotting to one of the owners one of several tracts, or a part of a single tract, in satisfaction of his share, and order a partition by sale of the remainder of the single tract, or of the other tracts, with a division of the sale proceeds among the other owners in satisfaction of their [***14] respective shares." Also, see Hall v. Hall, 250 Ala. 702, 35 So. 2d 681.

The remaining ground upon which the judgment is attacked is that the property was sold at a grossly inadequate price as a result of fraudulent collusion between the Mallard Lumber Company and Rhodus. If there existed such conspiracy, it was a vice which could not have been discovered by an examination of the record and, therefore, could not affect a *bona fide* purchaser. Moreover, there is no evidence to sustain the allegation of fraud. It may not be inferred from the fact alone [**664] that the property brought only \$ 100.00 when sold. Inadequacy of price, unless so gross as to shock the conscience of the court or accompanied by circumstances from which fraud may be clearly inferred, will not justify the overthrow of a judicial sale. Singleton v. Mullins Lumber Co., *supra*, 234 S.C. 330, 108 S.E.2d 414; Hamilton v. Patterson, S.C., 236 S.C. 487, 115 S.E.2d 68. There is no testimony showing the actual value of this property when it was sold in 1928. It brought substantially the same price as when sold for taxes in 1925. No legal duty rested upon either [***15] the Mallard Lumber Co. or Rhodus to see to it that there was a bid for the full value of the property. If it was sold at an inadequate price, it was probably [*74] due to the lack of interest on the part of the heirs of James Bennett. This is understandable. The only heir having a substantial interest was Washington Bennett. His share was heavily mortgaged and there were taxes to be paid. The fractional interest of the other heirs was exceedingly small. If a wrong was done them, they are not altogether without fault. As stated by the Court in Gladden v. Chapin, *supra*, 106 S.C. 486, 91 S.E. 796, 798, "they have no just ground to com-

237 S.C. 64, *74; 115 S.E.2d 659, **664; 1960 S.C. LEXIS 81, ***15

plain because the court declines to correct the wrong done them by doing a greater wrong to the defendants, and, in so doing, set a mischievous precedent."

Having concluded that appellants failed to overcome the presumption that the partition proceedings were valid, it is not necessary to determine whether Floyd established title by adverse possession. However, we have no hesitancy in saying that the overwhelming weight of the testimony is to that effect. Continuously for a period of approximately 17 years he leased the property, collected [***16] the rents and paid the taxes. He cut timber from the premises, cleared a substantial area of wood and stump land, repaired some of the houses and constructed new buildings, including houses for tenants and barns for the livestock and farm produce, and made various other improvements. His hostile possession was so open, visible and notorious that appellants knew, or in the exercise of ordinary diligence should have known, of the adverse character of his claim. Graniteville Company v. Williams, 209 S.C. 112, 39 S.E.2d 202. It is conceded that all who were minors became of age more than ten years prior to the commencement of this action.

Affirmed.

STUKES, C. J., and TAYLOR, LEGGE and MOSS, JJ., concur.

Positive
As of: May 9, 2012 9:56 AM EDT

Byars v. Cherokee County

Supreme Court of South Carolina

January 30, 1961, Decided

17740

Reporter: 237 S.C. 548; 118 S.E.2d 324; 1961 S.C. LEXIS 13

W. F. BYARS, Respondent, v. CHEROKEE COUNTY, Appellant

Notice:

Prior History: [***1] Action against a county for affirmation of the plaintiff's title to property which he had conveyed to the county and which it had reconveyed to him, under a condition subsequent in his deed, because the property was no longer used for a curing house. The Common Pleas Court of Cherokee County, Bruce Littlejohn, J., rendered a judgment for the plaintiff, and the defendant appealed. The Supreme Court, Moss, J., held that the county was bound to make the reconveyance, and that it was barred by laches and estoppel from repudiating it.

Affirmed.

Disposition: Exception overruled and judgment affirmed.

Core Terms

deed, curing, potato, reconveyance, estoppel, conveyed, ceased, lot of land, purposes, circumstances, grantor, laches, repurchase, doctrine, tract, condemnation, equitable, appears, auction, highway

Case Summary

Procedural Posture

Defendant county appealed a decision of the Common Pleas Court of Cherokee County (South Carolina), which entered judgment for plaintiff landowner in an action for affirmation of title to property.

Overview

The county appropriated money to build a potato curing house, and it purchased a small tract of land from the landowner for the site. An agreement was reached whereby the property would be offered to the landowner for repurchase if it ceased to be used for curing house purposes. When the county stopped using the property for a curing house, the landowner requested the county reconvey the property as provided in the deed, but the property was sold at public auction. The landowner purchased the property from a subsequent buyer, and he brought an action against the county

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for affirmation of his title. The trial court entered judgment in his favor, and the county appealed, arguing that there was a defect in the sale because of failure to properly advertise the property. The court affirmed, holding that when the landowner obtained a reconveyance of the property in accordance with the condition stated in his deed to the county, he was acting within his legal rights. If there was a defect in the sale, it was the county's fault and the county was barred by laches and equitable estoppel to repudiate its sale and the reconveyance on that ground.

Outcome

The court affirmed the trial court's judgment.

LexisNexis® Headnotes

Torts > Business Torts > Fraud & Misrepresentation > General Overview
Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Fraud is never presumed and evidence of it must be clear, cogent and convincing.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview
Torts > Business Torts > Fraud & Misrepresentation > General Overview

Where one acts within his legal rights, fraud will not be presumed or implied.

Real Property Law > Deeds > Construction & Interpretation

In construing a deed, it is elementary that the cardinal rule of construction is to ascertain and effectuate the intention of the parties, unless that intention contravenes some well-settled rule of law or public policy.

Real Property Law > ... > Warranty Deeds > General Warranty Deeds > Covenants of Title

The right of a grantor to say in his deed that the property conveyed shall be devoted to a particular purpose and that it shall revert to his estate when not so used, should be fully recognized and protected, yet, as the law does not favor forfeitures, before the Courts will declare one, a breach of the conditions of the deed must be clearly proved.

Governments > State & Territorial Governments > Claims By & Against
Governments > Federal Government > Claims By & Against
Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview
Governments > State & Territorial Governments > General Overview

There can be no estoppel against the United States or a state. Nevertheless, subject to limitations and exceptions, it is well established that in a "proper case" the doctrine of equitable estoppel may apply as against the federal and state governments, and that under circumstances which would estop a private individual an estoppel may be asserted against the United States, a state, or a state agency, commission, or officer.

Civil Procedure > ... > Pretrial Judgments > Nonsuits > Voluntary Nonsuits
Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches
Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Laches is the neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done, or neglecting or omitting to do what in law should have been done for an unreasonable and unexplained length of time and in cir-

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circumstances which afforded opportunity for diligence. In order that the defense of laches may be sustained, the circumstances must have been such as to import that the complainant had abandoned or surrendered the claim or right which he now asserts.

Headnotes/Syllabus

Headnotes

1. FRAUD.--Fraud must be alleged to be used in defense.
2. FRAUD.--Fraud is never presumed, and evidence thereof must be clear, cogent and convincing.
3. FRAUD.--Fraud will not be presumed or implied where one acts within his legal rights.
4. DEEDS.--Cardinal rule in construing deed is to give effect to intention of parties unless it contravenes some well-settled rule of law or public policy.
5. DEEDS.--Provision in deed to county requiring reconveyance should county cease to use land for curing house was a "condition subsequent", and when such use ceased grantor was entitled to reconveyance.

See publication Words and Phrases, for other judicial constructions and definitions of "Condition Subsequent".

6. COUNTIES.--No enabling act was necessary to authorize county to reconvey property under condition subsequent in deed to county requiring reconveyance should county cease to use land for curing house.
7. COUNTIES.--County's reconveyance of land, under condition subsequent in deed to county, because land was no longer used for curing house was neither void nor ultra vires.
8. COUNTIES--ESTOPPEL.--A County which had reconveyed to its grantor as required by condition subsequent in deed to it was barred by laches and estoppel from repudiating reconveyance in grantor's action to affirm his title over seven years after reconveyance.
9. EQUITY.--"Laches" is neglect for unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.

See publication Words and Phrases, for other judicial constructions and definitions of "Laches".

Counsel: Harry L. Cline, Esq., of Gaffney, for Appellant, cites: As to County Board of Commissioners having no power to convey the property in question: 217 S.C. 247, 60 S.E.2d 586; 56 S.E.2d 723, 216 S.C. 52; 21 S.C. 414. As to rule that a Board of County Commissioners may exercise only such powers as are expressly conferred upon it, or which are necessarily implied from those expressed, and that where there is a reasonable doubt as to the existence of a particular power in the Board of County Commissioners, it must be resolved against the Board and the power denied: 66 Mont. 45, 212 P. 1105; 70 Mont. 84, 233 P. 916; 87 Mont. 83, 285 P. 195; 165 P. 297; 20 C. J. S., Counties, Secs. 4, 49; 217 S.C. 247, 60 S.E.2d 586. As to the doctrine of laches: 147 U.S. 120, 36 L. Ed. 911; 95 F.2d 986; 23 S.E.2d 362, 201 S.C. 447; 2 S.E.2d

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838, 190 S.C. 314; 101 S.E.2d 844, 223 S.C. 311.

Wade S. Weatherford, Jr., Esq., of Gaffney, for Respondent, cites: As to one of the first canons of construction of deeds being that the intention of the grantor must be ascertained and effectuated if no settled rule of law be contravened, and this intent must be found within the "four corners" of the deed: 132 S.C. 306, 128 S.E. 31; 193 S.C. 98, 7 S.E.2d 724; 206 S.C. 96, 33 S.E.2d 75; 16 Am. Jur. 528, Secs. 161, 162; 16 Am. Jur. 570, Sec. 237. As to there being sufficient testimony to sustain the finding of fact, concurred in by both Master and Circuit Judge, that the County is barred by laches and equitable estoppel: 210 S.C. 136, 41 S.E.2d 780; 19 Am. Jur. 340, 342; 211 S.C. 223, 44 S.E.2d 442.

Judges: MOSS, Justice. STUKES, C. J., and TAYLOR, OXNER and LEGGE, JJ., concur.

Opinion by: MOSS

Opinion

[*550] [**325] MOSS, Justice.

In the Cherokee County Supply Act for the year 1945, approved March 14, 1945, 44 Stat. [***3] 745, there was appropriated the sum of \$ 2,500.00 to build a potato curing house in Lower Morgan Township. The Act further provided that the amount appropriated for the construction of the potato curing house should be expended by the A. A. A. Committee for said County and such Committee was authorized to purchase or receive as a gift a site therefor; the title to said property to be taken in the name of Cherokee County. In the 1946 Supply Act for Cherokee County, approved March 15, 1946, 44 Stat. 1935, there was an additional appropriation of \$ 672.52 to pay the balance due for the construction of such potato curing house.

It appears that pursuant to the foregoing authorization, a representative of the A. A. A. Committee of Cherokee County entered into negotiations with W. F. Byars, the respondent herein, for the purchase of a small tract of land containing .415 of an acre for the site of the potato curing house, and that an agreement was reached whereby the [*551] respondent executed and delivered to Cherokee County, the appellant herein, a deed for the small tract of land for a consideration of \$ 50, which said deed was dated August 17, 1945, and duly recorded in the office [***4] of the Clerk of Court for Cherokee County in Deed Book 2-Q, at page 198. This deed, pursuant to an agreement, contained the following proviso:

"Provided, that in case the said lot of land shall cease to be used by the County [**326] of Cherokee for curing house purposes that the said Forest Byars shall have the right to repurchase the said lot of land and have same reconveyed to him upon the payment of the said purchase price of \$ 50.00, Cherokee County to have the right to remove therefrom at that time, any improvements placed on the said land if desired."

The record shows that the A. A. A. Committee of Cherokee County constructed upon this small lot of land a cement block potato curing house. This building was completed in November, 1945. The cost of construction was paid by Cherokee County from the appropriation made in the 1945 and 1946 Supply Acts. It is undisputed that the said lot of land and the building erected thereon ceased to be used by the County of Cherokee for curing house purposes in the spring of 1947. The respondent testified that it was then that he asked the county to reconvey the property to him as was provided in this deed of conveyance to the county.

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[**5] It further appears that at a regular meeting of the Supervisor and the County Board of Commissioners held on September 5, 1950, a resolution was passed directing the sale of the potato curing house at public auction at 11:00 o'clock A. M. September 16, 1950. Pursuant to such authorization there was placed in the Gaffney Ledger the following advertisement:

"For Sale--Potato house in Macedonia Community to highest bidder on September 16, at 11:00 A. M."

[*552] It appears that at the appointed time the potato curing house was sold at public auction to one Claud Philips for the sum of \$ 70.00. The sale was held in front of the potato curing house and the auction was conducted by the Clerk of the County Board of Commissioners of Cherokee County. The purchaser sold the potato curing house building to one Roy Byars and the respondent purchased the building from the said Roy Byars.

It further appears that at a meeting of the Supervisor and the County Board of Commissioners held on October 3, 1950, a resolution was unanimously adopted reciting that the appellant had purchased from the respondent, on August 17, 1945, the lot of land herein referred to, for the sum of \$ 50.00, upon condition [***6] that should the county ever cease to use the same for potato curing house purposes, that it would reconvey the same to W. F. Byars for \$ 50.00. The resolution further recited that the county had ceased to use the said lot for the purposes aforesaid and directed the County Supervisor and the Clerk of the Board to execute a deed conveying the said premises to the respondent, in compliance with the condition contained in said deed. Pursuant to, and in compliance with said resolution, the appellant did by deed dated October 3, 1950, and recorded in the office of the Clerk of Court for Cherokee County, in Deed Book 3-V, at page 466, reconvey the said small tract of land to the respondent, he having repaid the county \$ 50.00, the original purchase price thereof.

The record shows that the respondent, from the time of the purchase of the potato curing house and the lot upon which it stood, used it continuously in his farming and orchard operations until October 9, 1957, at which time the State Highway Department condemned the said building and lot of land for highway purposes and made an award of \$ 1,554.00 for the lot of land and building thereon. On October 29, 1957, the Comptroller General [***7] of South Carolina issued a check for the amount of the condemnation award payable jointly to the respondent and the appellant.

[*553] The respondent instituted this action against the appellant seeking to have the Court affirm his title to the potato curing house and the lot of land upon which it was located, and to adjudicate that he alone was entitled to the proceeds of the highway condemnation award. It is the position of the appellant that the County Board of Commissioners for Cherokee County had no authority to sell the potato curing house building [**327] or to execute a deed to the property in question, their acts in so doing being void and *ultra vires*. It is further asserted that the conduct of the respondent and the County Board of Commissioners constituted a fraud upon the taxpayers of Cherokee County.

The issues made by the pleadings were referred to the Honorable Leroy Moore, as Special Referee, to take the testimony and to report his conclusions of fact and law. After the trial of the case before the said Special Referee, he filed his report, recommending that the Court issue its order declaring that the respondent was the sole and absolute owner of the [***8] potato curing house and lot at the time of the condemnation thereof by the State Highway Department, and also finding that the respondent was entitled to the proceeds of the condemnation award. The appellant excepted to this report and the matter was heard before the Honorable Bruce Littlejohn, Resident Judge

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of the Seventh Circuit, who, by his decree, dated October 16, 1959, overruled all of the exceptions and affirmed the said report. This appeal followed.

The appellant alleges that the sale of the potato curing house by the County Board of Commissioners and the sale and reconveyance of the lot of land in question by the said Board was a fraud upon the taxpayers of Cherokee County. The appellant asserts that the respondent and the County Board of Commissioners knew, or should have known, that the said premises were to be included within the right-of-way of a new highway, and that by reason of such knowledge, the conveyance of the property to the respondent constituted a fraud. Fraud must be alleged [*554] before one can have the advantage of a defense based thereon. Marston v. Rivers et al., 138 S.C. 295, 136 S.E. 222. We will assume, for the purpose of this [***9] appeal, that the answer of the appellant sufficiently alleged fraud as a defense. However, fraud is never presumed and evidence of it must be clear, cogent and convincing. Blackmon v. United Ins. Co., 235 S.C. 335, 111 S.E.2d 552. We find nothing in the evidence in this case from which fraud on the part of the respondent or the County Board of Commissioners might reasonably be inferred. When the respondent conveyed to the appellant the tract of land here involved, it was provided in such conveyance that should the appellant cease to use the said land for curing house purposes, then the respondent would have the right to repurchase the said lot of land and have the same reconveyed to him upon the payment of the purchase price of \$ 50.00. When the respondent obtained a reconveyance of the property in question, in accordance with the condition stated in his deed to the appellant, he was acting within his legal rights. When the County Board of Commissioners of Cherokee County reconveyed the property to the respondent, it was acting in accordance with the condition contained in the deed under which the county obtained title to the property in question. Where one acts within [***10] his legal rights, fraud will not be presumed or implied. Mishoe v. General Motors Acceptance Corporation, 234 S.C. 182, 107 S.E.2d 43.

What is the proper construction of the deed from the respondent to the appellant, which conveyed the lot in question with the condition therein as is hereinabove set forth? In construing a deed, it is elementary that the cardinal rule of construction is to ascertain and effectuate the intention of the parties, unless that intention contravenes some well-settled rule of law or public policy. Davis et al v. Davis et al., 223 S.C. 182, 75 S.E.2d 46; Grainger et al. v. Hamilton et al., 228 S.C. 318, 90 S.E.2d 209.

[*555] The testimony shows that the respondent owned a farm in Cherokee County and a member of the A. A. A. Committee of Cherokee County approached him for the purpose of purchasing a small tract of land so that a potato curing house could be erected thereon. The respondent testified that it was agreed that if the county should cease to use the property for a potato curing house, then the respondent would have the right to repurchase the property for the sum [*556] of \$ 50.00. This [***11] agreement was incorporated in the deed. The respondent was the absolute owner of his land and he had the legal right to sell it under such conditions as he might impose in the deed. If the appellant did not wish to purchase the said tract of land with the condition imposed, it should not have consummated the purchase. The respondent in this case had the right to say in his deed that the property conveyed should be devoted to a particular purpose and that he should have the right to repurchase the same if it was not used for such purpose. It was the clear intent of the grantor to convey the lot of land in question to the appellant with the condition as is therein stated that he would have the right to repurchase the same if the appellant ceased to use the property for potato curing house purposes. No other intention can be reached from the language used. It was likewise the clear intention of the grantor that if the appellant ceased to use the property for a potato curing house, then the appellant would have a right to remove therefrom, at the time of the reconveyance of the land to the respondent, any improvements placed on the land, if the appellant so desired.

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It is crystal clear [***12] that the appellant was purchasing the lot in question for the purpose of erecting thereon a potato curing house. It is equally clear that the respondent conveyed to the appellant the lot of land for such purpose, and attached thereto a reasonable condition that he would have the right to repurchase such lot of land if the appellant ceased to use the land for the purpose for which it was purchased. Since it is an admitted fact that appellant [*556] had ceased to use the building upon the land for a potato curing house, the event which gave the respondent the right to repurchase the land had happened, and this contractual provision in the deed became operative. The appellant was bound to the performance of such. In the case of White v. Britton, 75 S.C. 428, 56 S.E. 232, 234, it is said:

"* * * The right of a grantor to say in his deed that the property conveyed shall be devoted to a particular purpose and that it shall revert to his estate when not so used, should be fully recognized and protected, yet, as the law does not favor forfeitures, before the Courts will declare one, a breach of the conditions of the deed must be clearly proved."

In the case of Trustees of University of South Carolina v. City of Columbia, 108 S.C. 244, 93 S.E. 934, [***13] it was held that where land was conveyed to an incorporated Fire Company to occupy, use and enjoy the premises during the term of its corporate existence, to revert, in case the corporation should become extinct or forfeit its charter, title to the land reverted to the grantor when the company became extinct and ceased to fight fires.

In Hammond v. Port Royal & Augusta Ry. Co., 15 S.C. 10, it was held that where a deed conveyed a strip of land to a railroad company, to them, their successors and assigns forever, "provided always, and this deed is upon the express condition" that a certain system of drainage was to be kept up by the railroad company, the Court held that this created a condition subsequent in the deed, and voidable by the grantor upon condition broken.

The condition stated in the deed in this case, giving the grantor by the express words used, the right to a reconveyance of the property should the appellant cease to use the land for curing house purposes, is a condition subsequent, and upon the happening of the event stated entitled the grantor to a reconveyance of the property. A condition subsequent is one annexed to an estate already vested, by [***14] the performance of which such estate is kept and continued, and by the [*557] failure or nonperformance of which it is defeated; or it is a condition referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition. Black's Law Dictionary, Third Edition, page 390.

[**329] The appellant earnestly argues that the case of Williams et al. v. Wylie et al., 217 S.C. 247, 60 S.E.2d 586, 21 A.L.R.2d 717, is applicable and is authority for holding that the reconveyance made by the Supervisor and Board of County Commissioners to appellant was null and void. They assert that an enabling act is necessary to authorize the sale of county property. We do not think that the doctrine in the cited case is here applicable for the reason that the appellant obtained a deed on condition to the parcel of land when it was acquired. The county was bound by the condition in the deed that upon the discontinuance of the use of the property for potato curing purposes, respondent, under the terms of the conveyance, had the right to a reconveyance thereof.

The act of the Supervisor and [***15] the County Board of Commissioners reconveying to the respondent the tract of land in question was neither void nor *ultra vires*. It was the fulfillment and the performance of a condition stated in the deed by which the appellant obtained title to the property in question.

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The trial Judge affirmed the holding of the Special Referee that the appellant had been guilty of laches and was now estopped to question the deed by which a reconveyance of the property was made by the appellant to the respondent. The testimony shows that on October 3, 1950, appellant reconveyed the lot in question to the respondent. The appellant has taken no action to question this deed or to have it set aside. The county also took positive action to dispose of the potato curing house located upon the premises before the reconveyance of the land and actually sold the building at public auction. The appellant asserts that the [*558] building was not properly advertised because it was not stated where the sale would take place nor who the seller was. It is crystal clear from the record that the county took no legal action against the respondent concerning the reconveyance of the property, or the sale of [***16] the potato curing house thereon, until the respondent brought this action. We think the doctrine of laches and equitable estoppel was available to the respondent against the position taken by the appellant.

In the case of Powell v. Board of Commissioners of Police Insurance & Annuity Fund of State, 210 S.C. 136, 41 S.E.2d 780, 782, 1 A.L.R.2d 330, it was held:

"But we think the case turns upon a narrower point. It is that respondent's right arises from contract, the original authority and binding force of which is unquestioned, and granting that it was the State itself which voluntarily entered the relationship as the other contracting party, it may be subject to the doctrine of estoppel in its contract relations. The rule is a well established one in American courts generally. 19 Am. Jur. 819; 49 Am. Jur. 298; 31 C. J. S., Estoppel, § 138, p. 403 *et seq.*; State of Washington ex rel. Washington Paving Co. v. Clausen, 90 Wash. 450, 156 P. 554, L. R. A. 1917A, 436. The following is from 31 C. J. S., Estoppel, § 140, p. 411, with numerous supporting citations in the footnotes: 'It has been broadly stated that there can be no estoppel against the United [***17] States or a state. Nevertheless, subject to limitations and exceptions * * * it is well established that in a "proper case" the doctrine of equitable estoppel may apply as against the federal and state governments, and that under circumstances which would estop a private individual an estoppel may be asserted against the United States, a state, or a state agency, commission, or officer.'"

The case of the State v. Simring et al., 230 S.C. 49, 94 S.E.2d 9, was an action by the State to treat an appearance recognizance, and this Court had for decision the question of whether the State was estopped to assert that the [*559] condition of the [***330] recognizance was breached. We held that the right of the State arose from contract and was, therefore, subject to the doctrine of estoppel.

Laches is the neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done, or neglecting or omitting to do what in law should have been done for an unreasonable and unexplained length of time and in circumstances which afforded opportunity for diligence. De Laine et al. v. De Laine et al., 211 S.C. 223, 44 S.E.2d 442, [***18] In order that the defense of laches may be sustained, the circumstances must have been such as to import that the complainant had abandoned or surrendered the claim or right which he now asserts. Selden v. Kennedy, 104 Va. 826, 52 S.E. 635, 4 L. R. A., N. S., 944.

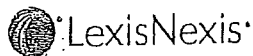
We think that the lower Court properly, under the facts and circumstances here revealed, applied the doctrine of laches and equitable estoppel. It is an admitted fact that the use of the building upon the lot in question for potato curing purposes was abandoned in 1947. A witness for the appellant testified that it was not practical to remove the building from the land because it was constructed of concrete blocks. The County Board of Commissioners of the appellant took the initiative in disposing of the building by sale at public auction. If there was any defect in such sale because of failure to properly advertise the same, such was the fault of the appellant, and we

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think that the lower Court properly held that it was too late to question any irregularities in the sale of the building, particularly in view of the fact that the respondent had no part in disposing of the potato curing house building. We [***19] think that the facts as found by the Special Referee and affirmed by the Circuit Judge amply support the conclusion that the appellant is now barred by laches and equitable estoppel to repudiate the sale of the potato curing house building and the reconveyance of the land to the respondent.

[*560] The exception of the appellant is overruled and the judgment of the lower Court is affirmed.

STUKES, C. J., and TAYLOR, OXNER and LEGGE, JJ., concur.



Caution
As of: May 9, 2012 9:56 AM EDT

Cumbie v. Newberry

Supreme Court of South Carolina

February 28, 1968

No. 18765

Reporter: 251 S.C. 33; 159 S.E.2d 915; 1968 S.C. LEXIS 125

Ex parte A. T. CUMBIE, Jr., Petitioner-Respondent, v. Hardin NEWBERRY and Winnie P. Jones, Clerk of Court, Williamsburg County, South Carolina, Respondents-Appellants. In re A. T. CUMBIE, Jr., Plaintiff, v. George CUMBIE, Ellen Cumbie Newberry, Juanita Cannon Cumbie, Johnny Raymond Cumbie, Juanita Cumbie, Bernice Enter Strong, Frank C. Enter and Minor Defendants over the age of fourteen (14) years, Oscar Bernard Cumbie, Dan Rhett Cumbie, Frankie Cumbie, and the Minor Defendant under the age of fourteen (14) years, Annette Cumbie, Defendants

Notice:

Disposition: [***1] The judgment of the lower court is accordingly reversed and the case remanded for entry of judgment in favor of appellant, Hardin Newberry.

Core Terms

bid, resale, parties, bidder, fail to comply, purchaser, deposit, notice, personal notice, judicial sale, sales, terms

Case Summary

Procedural Posture

Appellants, a purchaser and a court clerk, sought review of a decision from a South Carolina trial court, which entered judgment in favor of respondent in respondent's action to have a judicial sale and deed to the purchaser set aside and the property resold.

Overview

In an action for partition brought by respondent a judicial sale of the land was ordered. When the original buyer could not comply with the terms of his bid the clerk resold the property to the purchaser. Three years after the sale respondent sought to have the sale and deed set aside and the property resold on the ground that the clerk had no authority to resell the property without having given personal notice to the parties in the original action. Judgment was entered in favor of respondent. On appeal, the court stated that the rule applicable to the action was that a purchaser in good faith at a judicial sale was not affected by irregularities in the proceedings or even error in the judgment under which the sale was made. The purchaser in good faith only had to make inquiry as to the jurisdiction of the court that ordered the sale and whether all proper par-

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ties were before the court when the order was made. Under the record the purchaser was a purchaser in good faith. It was undisputed that the court, which issued the order of sale, had jurisdiction and that all proper parties were before the court. Under those circumstances the purchaser obtained good title to the property.

Outcome

The court reversed the trial court's judgment and remanded the cause for entry of judgment in favor of the purchaser.

LexisNexis® Headnotes

Contracts Law > Types of Contracts > Bona Fide Purchasers
 Civil Procedure > Remedies > Provisional Remedies > General Overview
 Real Property Law > ... > Encumbrances > Ownership & Transfer > General Overview

A sound public policy requires that the validity of judicial sales be upheld, if in reason and justice it can be done. In the furtherance of this principle, the Supreme Court of South Carolina's decisions have applied the general rule that a purchaser in good faith at a judicial sale is not affected by irregularities in the proceedings or even error in the judgment, under which the sale is made; but is required at his peril only to make inquiry as to the jurisdiction of the court which ordered the sale, and whether all proper parties were before the court when the order was made.

Counsel: Messrs. Connor & Connor, of Kingstree, for Respondents-Appellants, cite: As to error on part of trial Judge in setting aside the clerk's deed to respondent-appellant: 203 Fed. 648, 24 A.L.R. 1135; 25 S.C. 275; 33 S.E. (2d) 390, 196 S.C. 877.

T. Kenneth Summerford, Esq., of Florence for Petitioner-Respondent, cites: As to the setting aside of the deed being a discretionary matter and the action of the lower court will not be disturbed by the appellate court in the absence of a showing of abuse of discretion: 166 S.C. 44, 164 S.E. 313.

Judges: Lewis, Justice. Moss, C.J., and Bussey, Brailsford and Littlejohn, JJ., concur.

Opinion by: LEWIS

Opinion

[*35] [**916] This case concerns the validity of a judicial sale of a tract of land located in Williamsburg County. Other issues in the case were before us in a prior appeal. 245 S.C. 107, 139 S.E. (2d) 477.

A. T. Cumbie, Jr., a resident of Florence County, heretofore instituted an action in Williamsburg County against George Cumbie *et al.* for the partition of two [***2] tracts of land, one containing 50 acres and the other 15.1 acres. This appeal is only concerned with the smaller tract. During the progress of the litigation, the parties agreed that the 15.1 acre tract should be sold and the proceeds held until the further order of the court. The court accordingly issued a consent order under date of September 3, 1963 for the sale of this parcel.

The order of sale provided that the land be "advertised in the County Herald, a newspaper published in the County of Williamsburg, State of South Carolina, in the manner as prescribed by law,

251 S.C. 33, *35; 159 S.E.2d 915, **916; 1968 S.C. LEXIS 125, ***2

and that said property be sold at public auction * * * on the Legal Sales Day in October, 1963, by the Clerk of Court for Williamsburg County, or upon some subsequent and convenient Sales Day thereafter during the usual hours of public sale, for cash." Other provisions of the order required that the successful bidder at the sale deposit 5% of his bid with the clerk of court as evidence of good faith and "that if the successful bidder shall fail to comply with the terms of his bid at the time of said bid, the premises shall immediately be resold at such bidder's risk on the same sales day, or at some subsequent sales [***3] day as the clerk of court may find convenient and advantageous; should the highest bidder fail to comply with the terms of his bid within 10 days after the acceptance of said bid, said premises shall be readvertised and resold on the same terms at the purchaser's risk at some subsequent sales day." Upon full compliance with the terms of the sale, the clerk was authorized to execute to the purchaser a fee simple title to the property.

[*36] In due course the property was advertised and offered for sale by the clerk of court on October 7, 1963 in accordance with the foregoing order. It was bid in for the sum of \$ 1,100.00 by one T. J. Appleby who immediately deposited 5% of his bid with the clerk. After making the deposit, Appleby had ten days under the terms of the order within which to fully comply with his bid. However, he failed to comply and the clerk refunded to him the deposit which he had made at the time of sale. (Questions concerning the liability of Appleby and the authority of the clerk to refund the deposit to him are not involved in this appeal.)

Following the failure of Appleby to comply with his bid, the property was duly readvertised as provided in the order [***4] of sale and resold at public auction on February 3, 1964. Admittedly, personal notice of default of the original bidder and of the resale was not given to the parties to the original action. The land was bid in at the resale by the attorney for appellant Hardin Newberry, husband of one of the parties to the original action, for the sum of \$ 700.00. This amount was promptly paid and the clerk issued to Newberry a deed for the property on February 3, 1964, under which Newberry had been in possession since that time.

On June 19, 1967, approximately three years after the sale to Newberry, the respondent A. T. Cumbie, Jr., plaintiff in the original action, instituted this proceeding, [**917] by petition in the original cause, seeking to have the sale and deed to Newberry set aside and the property resold, upon the ground that the clerk had no authority to offer the property in question for resale without giving personal notice to the parties to the original action. Respondent contended that he had no opportunity to be present and protect his interests at the bidding since personal notice of the sale was not given to him and, being a resident of another county, he did not see the [***5] advertisement of the resale which appeared in a newspaper published in Williamsburg County. The lower court sustained respondent's position and set aside the sale and deed to appellant Newberry.

[*37] The sole question to be decided in this appeal is whether the deed or title obtained by appellant Newberry, the purchaser at the resale of the property, should be set aside because respondent, a party to the action, was not given actual notice of the resale.

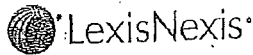
A sound public policy requires that the validity of judicial sales be upheld, if in reason and justice it can be done. In the furtherance of this principle, our decisions have applied the general rule, applicable here, that a purchaser in good faith at a judicial sale is not affected by irregularities in the proceedings or even error in the judgment, under which the sale is made; but is required at his peril only to make inquiry as to the jurisdiction of the court which ordered the sale, and whether all proper parties were before the court when the order was made. Wingard v. Hennessee, 206 S.C. 159, 33 S.E. (2d) 390; Brownlee v. Miller, 208 S.C. 252, 37 S.E. (2d) 658; Bennett v. Floyd, 237 S.C. 64, 115 S.E. [***6] (2d) 659.

Under the present record, appellant was a purchaser in good faith. It is undisputed that the court which issued the order of sale had jurisdiction and that all proper parties were before the court. Under these circumstances appellant obtained good title to the property.

There is no merit in respondent's contention that the validity of appellant's title was affected by the failure to give personal notice of the resale to the parties to the action. The authority of the clerk to sell the property was derived from the order of sale. It was a public document and all parties were charged with notice of its terms. The order provided for a sale of the property by the clerk and for a resale by him if the successful bidder at the first sale failed to comply with his bid within ten days after its acceptance. It is undisputed that the property was sold at the first sale to the highest bidder after proper advertisement; that his bid was accepted upon payment of the required deposit; and that he failed to comply with his bid within ten days thereafter. Under these facts, since the [*38] order of sale specifically directed a resale of the property by the clerk in the event [***7] the successful bidder failed to comply with his bid, the clerk was authorized to resell the property without a further or new order of the court.

The record also shows that every required notice was given of the resale of the property. There was no provision of the order or of statute requiring personal notice of the sale or resale to be given to the parties to the action. The same notice was given of the resale as was given of the original sale. This was in accord with the requirements of the order of the court. Since the record showed that the notice required by the order and statutes had been given, any lack of knowledge by, or other notice to, a party to the action could not adversely affect a purchaser in good faith.

The judgment of the lower court is accordingly reversed and the case remanded for entry of judgment in favor of appellant, Hardin Newberry.



Cited
As of: May 9, 2012 9:56 AM EDT

Eastern Sav. Bank, FSB v. Sanders

Court of Appeals of South Carolina

April 3, 2007, Heard; April 16, 2007, Filed

Opinion No. 4234

Reporter: 373 S.C. 349; 644 S.E.2d 802; 2007 S.C. App. LEXIS 62

Ex Parte: Eastern Savings Bank, FSB, Appellants; v. Albert J. Sanders, Jr., Respondent. In Re: Eastern Savings Bank, FSB, Plaintiff, v. Roy A. Rouse, a/k/a Roy Rouse; Jean C. Rouse, a/k/a Jean Rouse; Neff Rental, Inc.; and Oswald Wholesale Lumber, Inc., Defendants.

Notice:

Prior History: [***1] Appeal From Lexington County. Clyde N. Davis, Jr., Master-In-Equity.

Disposition: AFFIRMED.

Core Terms

bid, judicial sale, shock, conscience, mortgagee, circumstances, inadequacy of price, foreclosure, bidder, trial court, sale price, auction, property value, actual value, percent, courts, sales, sell property, initial sale, deficiency judgment, foreclosure sale, purchaser, regularly

Case Summary

Procedural Posture

Appellant bank filed a petition in the Lexington County Circuit Court (South Carolina), for a foreclosure action and a deficiency judgment against defendant mortgagors. The master-in-equity entered a judgment of foreclosure and ordered the property sold at public auction. After the property was sold to respondent buyer, the bank filed a motion to vacate and set aside the foreclosure sale. The master-in-equity denied the motion. The bank appealed.

Overview

At the public auction of property on which the bank held a mortgage, the bank instructed its legal counsel to bid up to a set amount for the property. A paralegal at the counsel's law firm instructed a representative of the law firm to bid an initial amount at the auction, and then bid up to the set amount if necessary. The initial bid submitted by the law firm was the highest bid. However, pursuant to S.C. Code Ann. § 15-39-720 (2005), bidding was reopened, with the buyer submitting the highest bid. No representative of the law firm appeared at the subsequent bidding. On appeal, the court noted that neither the officer presiding over the sale, the buyer, nor any other bidder made a mistake or perpetrated a fraud. Further, the paralegal, whose actions were imputable to the bank, testified that the mistake was solely her own. Thus, the master did not err in de-

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termining not to set aside the sale. The sale price was less than the value of the property because of a mistake by the bank's counsel, not as a result of conduct by an official conducting the sale or another bidding party. Additionally, the inadequacy of the sale was not so gross as to shock the conscience of the court.

Outcome

The order of the master was affirmed.

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Judges > Discretionary Powers
 Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law
 Civil Procedure > Preliminary Considerations > Equity > General Overview

A mortgage foreclosure is an action in equity. The scope of review of a case heard by a master who enters a final judgment is to determine facts in accordance with the appellate court's own view of the preponderance of the evidence. However, the determination of whether a judicial sale should be set aside is a matter left to the sound discretion of the trial court. The review of a judicial sale is equitable in nature and within the discretion of the trial court.

Real Property Law > ... > Financing > Foreclosures > Judicial Foreclosures

Where a mortgagee has sought a deficiency judgment, law requires a foreclosure sale held open for 30 days after the initial sale date. S.C. Code Ann. § 15-39-720 (2005).

Real Property Law > ... > Financing > Foreclosures > Judicial Foreclosures

See S.C. Code Ann. § 15-39-720 (2005).

Real Property Law > ... > Financing > Foreclosures > Judicial Foreclosures

A mortgagee must enter his bid at the time a sale is made and is precluded from entering any other bid after his last bid at the initial sale. This effectively forces the mortgagee to enter his highest and best bid at the initial sale.

Real Property Law > ... > Financing > Foreclosures > Judicial Foreclosures

A judicial sale should not be set aside except for cogent reasons. The purpose of the law and of the proceedings in which a sale has been decreed is that it shall be final. As has been said time and again in cases involving the setting aside of judicial sales, it is the policy of the courts to uphold such sales when regularly made, and when it can be done without violating principle or doing injustice. South Carolina courts zealously insure judicial sales be openly and freely conducted and nothing be allowed to chill the bidding.

Real Property Law > ... > Financing > Foreclosures > Judicial Foreclosures

The rule is well settled that inadequacy of price, unless so gross as to shock the conscience of a court, or accompanied by other circumstances warranting the interference of the court, will not justify the setting aside of a judicial sale. Mere inadequacy of price, unaccompanied by other circumstances which would invoke the exercise of the court's discretion is not sufficient, unless, perhaps, it is so great as to raise a presumption of fraud or to shock the conscience of the court. Where unfair means have not been employed to prevent competition at a judicial sale, mere inadequacy of price is no ground for setting the sale aside. Thus, a judicial sale can be set aside for

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two reasons: (1) if the inadequacy of the price is so gross as to shock the conscience of the court; or (2) if the price is inadequate and this inadequacy is accompanied by other circumstances that warrant the interference of the court.

Real Property Law > ... > Financing > Foreclosures > Judicial Foreclosures

When an inadequacy of price exists and is the result of action by the officer selling a property or successful bidder, and that action could not have been reasonably anticipated by the party for whose benefit the property was being sold, a court should provide relief by setting aside the sale. The circumstances impeaching the fairness of the transaction should relate to the conduct of the officer making the sale or to the conduct of the purchaser participating in the attempt to stifle competition or affected with notice thereof. If neither the officer making the sale nor the purchaser contributed to the mistake of a party intending to bid higher, and the sale was fair and regularly conducted, simply because a party intended to bid higher, but neglected to do so, or was prevented by a mistake, is not a sufficient ground for setting aside a judicial sale.

Real Property Law > ... > Financing > Foreclosures > Judicial Foreclosures

South Carolina has not established a bright line rule for what percentage a sale value must be with respect to the actual value in order to shock the conscience of the court. However, a search of South Carolina jurisprudence reveals only when judicial sales are for less than 10 percent of a property's actual value, have South Carolina courts consistently held the discrepancy to shock the conscience of the court.

Counsel: Thomas A. Shook and Sean O'Connor, both of North Charleston, for Appellant.

James W. Poag, Jr., of West Columbia, for Respondent.

Judges: ANDERSON, J. KITTREDGE and SHORT, JJ., concur.

Opinion by: ANDERSON

Opinion

[*352] [**803] ANDERSON, J.: Eastern Savings Bank, FSB appeals the master-in-equity's denial of its motion to vacate and set aside a foreclosure sale because [**804] of a bidding mistake by Bank's counsel and low sales price that resulted. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Eastern Savings Bank, FSB ("the Bank") obtained a mortgage from Roy and Jean Rouse in the amount of \$ 490,000.00 on real property and a house located at 117 Maxie Road in Lexington ("the Property"). When the Rouses failed to make their scheduled payments, the Bank elected to accelerate payment of the entire indebtedness, which, including attorney's fees and costs, amounted to \$ 578,303.20. In August 2005, the Bank sought foreclosure of the mortgage and expressly demanded the right to a deficiency judgment, reserving the right to waive the deficiency at the time of sale. The master entered a judgment of foreclosure for the Bank and ordered the Property sold at public auction.

Following [***2] advertisement, the Property was set to be auctioned on October 3, 2005, a regularly scheduled sales date. The Bank instructed its counsel to bid up to \$ 550,000.00 for the prop-

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erty. This information was communicated to Bonnie Hook, a paralegal for the Bank's law firm who typically worked with foreclosures. Hook did not personally go to the sale, but instead sent her assistant with instructions to "begin [bidding] at \$ 100,000.00 and to go up to \$ 550,000.00." Following Hook's instructions, the representative bid \$ 100,000.00. There were no other bids made at that time.

Pursuant to section 15-39-720 of the South Carolina Code (2005), bidding was reopened on November 2, 2005, with several individuals placing offers. Albert Sanders had the highest bid (\$ 246,000.00) and paid the requisite five percent deposit to the court. Neither the Bank, its counsel, nor any other representative was present at the second auction. Presumably, they declined to attend because the Bank was barred from making another bid under section 15-39-720, or possibly because they simply had not realized bidding had not closed after the October 2 proceeding.

[*353] On November 3, 2005, the Bank inquired with Hook in regard [***3] to the bid from Sanders. Hook then contacted the court, whereupon she learned the Property involved a deficiency judgment and immediately recognized she had made a mistake in her earlier bidding instructions to her assistant.

On November 9, 2005, the Bank filed a motion to vacate and set aside the sale to Sanders. The Bank argued the low sales price, along with the misunderstanding and circumstances that caused the Bank to mistakenly bid only \$ 100,000.00, dictated the sale be set aside. Additionally, the Bank asserted the price Sanders paid was so low as to shock the conscience of the court.

The master held a hearing on the matter in January 2006. As stated in the master's order, Hook "candidly admitted that she made a mistake in her bid instructions and that no one else was responsible for the error. She stated that the sale was properly held and that no third party interfered with bidding."

Testimony and other evidence provided values of the Property ranging from \$ 324,940.00 to \$ 900,000.00. The assistant vice-president for the Bank testified that despite Bank authorizing only \$ 550,000.00 as its highest bid, he valued the Property at \$ 700,000.00 for lending purposes. Although the [***4] Rouses never received an offer, the home had been marketed for sale prior to foreclosure and was listed for as low as \$ 625,000.00. Renee Bolos, the real estate agent who first represented the Rouses, stated she estimated the Property to be worth \$ 900,000.00. Rusty Johnson, a real estate agent who later attempted to sell the Property, valued it at \$ 750,000.00. After listing the Property at this price for six months, the amount was reduced to \$ 600,000.00. Nevertheless, Johnson was unable to generate any offers. When the Rouses attempted to sell the Property at private auction with a reserve price of \$ 650,000.00, the highest bid received was \$ 350,000.00. The county tax appraisal for the home was \$ 324,940.00.

The master found the value of the Property to be \$ 550,000.00. Although recognizing the sales price was below market value, he stated that he did not believe it to be so inadequate as to shock the conscience of the [**805] court. Further, the master determined it was by mistake on the part of the [*354] bidder on the Bank's behalf, not any conduct by the sales officer or other bidder, that caused the winning bid to be less than the actual value of the Property. Accordingly, the master denied [***5] the Bank's motion to vacate and set aside the sale. The Bank filed a Rule 59(e), SCRPC, motion to alter or amend the judgment. The master denied this motion.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity. Our scope of review of a case heard by a master who enters a final judgment is to determine facts in accordance with our own view of the pre-

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ponderance of the evidence," Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997) (internal citations omitted). However, the determination of whether a judicial sale should be set aside is a matter left to the sound discretion of the trial court. Investors Sav. Bank v. Phelps, 303 S.C. 15, 17, 397 S.E.2d 780, 781 (Ct. App. 1990) (citing Bonney v. Granger, 300 S.C. 362, 387 S.E.2d 720 (Ct. App. 1990)). The review of a judicial sale is equitable in nature and within the discretion of the trial court. Fed. Nat'l Mortgage Ass'n v. Brooks, 304 S.C. 506, 512, 405 S.E.2d 604, 607 (Ct. App. 1991) (citing Spillers v. Clay, 233 S.C. 99, 102, 103 S.E.2d 759, 760 (1958)).

LAW/ANALYSIS

The Bank contends the master erred in failing to grant its motion to set aside and vacate the sale. We disagree.

Where a mortgagee [***6] has sought a deficiency judgment, law requires the foreclosure sale held open for thirty days after the initial sale date. S.C. Code Ann. § 15-39-720 (2005). The South Carolina Code provides:

In all judicial sales of real estate for the foreclosure of mortgages and sales in execution the bidding shall not be closed upon the day of sale but shall remain open until the thirtieth day after such sale, exclusive of the day of sale. Within such thirty day period any person other than the highest bidder at the sale or any representative thereof in foreclosure and execution suits may enter a higher bid upon complying with the terms of sale by making any necessary deposit as a guaranty of his good faith, and thereafter [***5] within such period any person, other than such highest bidder at the sale or any representative thereof, in foreclosure suits may in like manner raise the last highest bid, and the successful purchaser shall be deemed to be the person who submitted the last highest bid within such period and made the necessary deposit or guaranty. But the mortgagee or his representative shall enter such bid as he desires at the time the sale is made, and he and all persons acting in his behalf [***7] shall be precluded from entering any other bid in any amount at any other time except the single or last bid made by him or in his behalf at the sale. . . .

The bidding shall be reopened by the officer making the sale on the thirtieth day after the sale, exclusive of the day of the sale, at eleven o'clock in the forenoon and the bidding shall be allowed to continue until the property shall be knocked down in the usual custom of auction to the successful highest bidder complying with the terms of sale. . . .

S.C. Code Ann. § 15-39-720 (2005). Thus, "[t]he mortgagee must enter his bid at the time the sale is made and is precluded from entering any other bid after his last bid at the initial sale. This effectively forces the mortgagee to enter his highest and best bid at the initial sale." 27 S.C. Juris. Manner of Sale § 128 (1996) (internal citation omitted).

"A judicial sale should not be set aside except for cogent reasons. The purpose of the law and of the proceedings in which a sale has been decreed is that it shall be final." Spillers v. Clay, 233 S.C. 99, 104, 103 S.E.2d 759, 761-62 (1958). "As has been said time and again in cases involving the setting aside of judicial sales, it [***8] is the policy of the Courts to uphold such sales when regularly made, and when it can be done without violating principle or doing injustice" Henry v. Blakely, 216 S.C. 13, 18, 56 S.E.2d 581, 583 (1949). Our courts zealously insure judicial sales be openly and freely conducted and nothing be allowed to chill [***806] the bidding. Howell v. Gibson, 208 S.C. 19, 31, 37 S.E.2d 271, 276 (1946).

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"[T]he rule is well settled that inadequacy of price, unless so gross as to shock the conscience of the court, or accompanied by other circumstances warranting the interference of the court, will not justify the setting aside of a judicial sale." Spillers, 233 S.C. 99, 104, 103 S.E.2d 759, 761 (citing [*356] Brownlee v. Miller, 208 S.C. 252, 37 S.E.2d 658 (1946)). "[M]ere inadequacy of price, unaccompanied by other circumstances which would invoke the exercise of the Court's discretion is not sufficient, unless, perhaps, it is so great as to raise a presumption of fraud or to shock the conscience of the Court." Henry, 216 S.C. at 18, 56 S.E.2d at 583. "Where unfair means have not been employed to prevent competition at a judicial sale, mere inadequacy of price is no ground for setting [the sale] aside." Ex parte Cooley, 69 S.C. 143, 154-55, 48 S.E. 92, 95 (1904). [***9] Thus, a judicial sale can be set aside for two reasons: (1) if the inadequacy of the price is so gross as to shock the conscience of the court; or (2) if the price is inadequate and this inadequacy is accompanied by other circumstances that warrant the interference of the court.

I. Circumstances Impeaching the Fairness of the Transaction

When an inadequacy of price exists and is the result of action by the officer selling the property or successful bidder, and that action could not have been reasonably anticipated by the party for whose benefit the property was being sold, the court should provide relief by setting aside the sale. See Henry, 216 S.C. at 19, 56 S.E.2d at 583. "[T]he circumstances impeaching the fairness of the transaction should relate to the conduct of the officer making the sale . . . or to the conduct of the purchaser participating in the attempt to stifle competition or affected with notice thereof" Appeal of Paslay, 230 S.C. 55, 61, 94 S.E.2d 57, 59-60 (1956) (quoting Ex parte Cooley, 69 S.C. 143, 155, 48 S.E. 92, 96 (1904)). If neither the officer making the sale nor the purchaser contributed to the mistake of a party intending to bid higher, and the sale [***10] was fair and regularly conducted, simply because a party intended to bid higher, but neglected to do so, or was prevented by a mistake, is not a sufficient ground for setting aside a judicial sale. Id. at 154, 48 S.E. at 95; see also Howell, 208 S.C. at 33, 37 S.E.2d at 276 (declining to set aside the sale where a plan to bid did not succeed, but its failure was due to no fault of the master, auctioneer; the winning bidder or any other person connected with the sale, but was due to the negligence or fault of the party complaining).

[*357] In Appeal of Paslay, 230 S.C. 55, 94 S.E.2d at 57 (1956), the appellant alleged he had been prepared to bid at least \$ 1,000.00 for property that sold for \$ 450.00. The appellant instructed his lawyer to bid as such; however, the attorney was prevented from attending the sale as a result of the mechanical failure of his automobile. Noting counsel's explanation for his absence did not involve the actions of the selling officer, the South Carolina Supreme Court found the circumstances did not warrant vitiating the sale. Id. at 58, 94 S.E.2d at 58.

In Spillers, where the officer conducting the sale deviated from the usual sales procedure, the Supreme Court found [***11] the claim of misapprehension and excusable mistake on the part of counsel was in relation to the conduct of the sale and accordingly affirmed the setting aside of the sale. 233 S.C. 99, 105, 103 S.E.2d 759, 762 (1958). Distinguishing the facts of Spillers and Paslay, the court enunciated:

Distinction between that case and this is readily apparent. There no factor was present for which the selling officer had any responsibility; here the claim of misapprehension and excusable mistake on the part of counsel was in relation to the conduct of the sale.

In the case at bar Judge McGowan concluded from all of the evidence that the auctioneer had probably been overhasty in knocking the property down to Mr. Spillers, and

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that under all the circumstances Mr. Clay's misapprehension of the final bid was excusable. These conclusions, together with his further finding that the property is worth much more than the price at which it was knocked down, that the parties [**807] to the cause were ready to bid a much higher figure, and that to permit completion of the sale at the price bid by Mr. Spillers would result in injustice to the partitioners, are not without support in the evidence.

Id. at 105, 103 S.E.2d 762.

In [***12] the case *sub judice*, neither the officer presiding over the sale, Sanders, nor any other buyer made a mistake or perpetrated a fraud. The Bank demanded the deficiency judgment and therefore knew, or should have known, the sale would follow the deficiency procedure. Hook, whose actions [*358] are imputable to the Bank, testified the mistake was solely her own. Assuming, *arguendo*, the selling price to Sanders was inadequate (but not so great as to shock the conscience), there are simply no factors attributable to the selling officer or successful bidder or other circumstances warranting the sale be set aside. Accordingly, the master correctly found the judicial sale should not be vitiated.

II. Inadequacy of Price as to Shock the Conscience

The Bank argues the master incorrectly determined the value of the Property and therefore erred in finding the final bid was not so inadequate as to shock the conscience of the court because. We disagree.

Although the master found the Property to be worth \$ 550,000.00, the Bank urged the master to set the value of the Property at \$ 750,000.00. We find no error in the master's valuation. When offered at private auction, the property did not receive a bid remotely [***13] close to its \$ 650,000.00 reserve price. Real estate agent Johnson tried for over half a year to sell the property at \$ 750,000.00 and was still unable to sell the property when the Rouses dropped the listing price to \$ 600,000.00. Even the Bank's own witnesses agree there were copious factors negatively affecting the Property's curb appeal and value. Testimony revealed the house is not in a particularly attractive location but is on a busy thoroughfare with commercial property next door and a trailer across the street, has no yard, remains unfinished, and is over-sized for the area it is located. Chris Johnson, an assistant vice-president at the Bank asseverated, "I said bid up to \$ 550,00.00 based on what I consider the value to be at the time and on subsequent events, the fact that it hadn't yet sold and the list price was down to \$ 600,000.00, so given that situation, I thought if a third party bid that [on] sale, that was a number that we were willing to let the property go." The evidence luculently supports the master's finding that the Property value be set at \$ 550,000.00.

Even assuming the master should have determined the value of the Property to be \$ 750,000.00, Sanders still [***14] paid a third of the value. While this may have been inadequate, it is not so grossly inadequate as to shock the conscience of the court.

[*359] South Carolina has not established a bright line rule for what percentage the sale value must be with respect to the actual value in order to shock the conscience of the court. However, a search of South Carolina jurisprudence reveals only when judicial sales are for less than ten percent of a property's actual value, have our courts consistently held the discrepancy to shock conscience of the court. In *Investors Sav. Bank v. Phelps*, 303 S.C. 15, 19, 397 S.E.2d 780, 782 (Ct. App. 1990), this court affirmed the master's decision to set aside a sale where the bid of \$ 510.00 was slightly more than one percent of the original amount of the loan and mortgage. We found that even if the property was worth only a fourth of the amount loaned on it four and a half years

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earlier, the bid was still only four percent of the value. *Id.* The court noted New York courts consistently hold foreclosure sale bids of less than ten percent of the value are unconscionably low. *Id.* (citing *Polish Nat'l Alliance of Brooklyn, U.S.A. v. White Eagle Hall Co.*, 98 A.D.2d 400, 470 N.Y.S.2d 642, 649 (N.Y. App. Div. 1983) [***15] ("Foreclosure sales at prices below 10% of value have consistently been held unconscionably low in this State . . ."). In *Poole v. Jefferson Standard Life Ins. Co.*, 174 S.C. 150, 158, 177 S.E. 24, 28 (1934), the South Carolina Supreme Court set aside a foreclosure sale based, in part, on the fact that the high bid was \$ 500.00 for property worth more than \$ 5,000.00.

By comparison, in *Peoples Fed. Sav. & Loan Ass'n v. Graham*, 291 S.C. 178, 352 [**808] S.E.2d 511 (Ct. App. 1987), this court found the sale price of \$ 48,100.00 for property subsequently appraised at \$ 73,000.00, was not so inadequate as to shock the conscience of the court and affirmed the trial court's decision not to set aside the sale. The court stated, "Although the sale price in the instant case was less than the value of the property, it was not so grossly inadequate as to shock . . ." *Id.* at 182, 352 S.E.2d at 513.

In the present case, the Property would have to be worth more than \$ 2,460,000.00 for the sale price to be less than ten percent of the actual value. None of the Bank's experts set its worth at more than \$ 900,000.00. Taking the value the Bank asserts the master should have placed on the Property, \$ 750,000.00, [***16] the sale price was approximately a third of the [*360] actual value. Accordingly, the inadequacy of the price was not so gross as to shock the court's conscience.

CONCLUSION.

We hold the master did not err in determining the sale should not be set aside. The sale price was less than the value of the Property because of a mistake by the Bank's counsel, not as a result of conduct by an official conducting the sale or another bidding party. The master correctly determined the inadequacy of the sale was not so gross as to shock the conscience of the court. Therefore, the order of the master is

AFFIRMED.

KITTREDGE and SHORT, JJ., concur.



Caution

As of: May 9, 2012 9:56 AM EDT

Robinson v. Estate of Harris

Court of Appeals of South Carolina

February 1, 2008, Submitted; April 18, 2008, Filed

Opinion No. 4372

Reporter: 378 S.C. 140; 662 S.E.2d 420; 2008 S.C. App. LEXIS 66

Sara Mae Robinson, Mary Ann Campbell, James Scott, Ellis Scott, William Scott, Shirley Pinckney Hughes, Julius Steven Brown, Leon Brown, Annabell Brown, Loretta Ladson, Kathleen Brown, Mozelle B. Rembert, Patricia Frickling, Ruth Mitchell, Gwendolyn Dunn, Angela Hamilton, Geraldine Jameson, Remus Prioleau, Julius Prioleau, Anthony Prioleau, Judy Brown, Franklin Brown, Kathy Young, Kenneth Prioleau, Willis Jameson, Melvin Pinckney, William "Alonzie" Pinckney, Ruth Fussell, Hattie Wilson, Marie Watson, Gloria Becoat, Angela T. Burnett and Lawrence Redmond, Appellants, v. The Estate of Eloise Pinckney Harris, Jerome C. Harris, a Personal Representative and sole heir and devisee of the Estate of Eloise P. Harris, Daniel Duggan, Mark F. Teseniar, Nan M. Teseniar, David Savage, Lisa M. Shogry-Savage, Debbie S. Dinovo, Martine A. Hutton, The Converse Company, LLC, Judy Pinckney Singleton, Mary Leavy, Michelle Davis, Leroy Brisbane, Frances Brisbane, and John Doe, Jane Doe, Richard Roe, and Mary Roe, who are fictitious names representing all unknown persons and the heirs at law or devisees of the following deceased persons known as of Simeon B. Pinckney, Isabella Pinckney, Alex Pinckney, Mary Pinckney, Samuel James Pinckney, Rebecca Riley Pinckney, James H. Pinckney, William Brown, Sara Pinckney, Julia H. Pinckney, Laura Riley Pinckney Heyward, Herbert Pinckney, Ellis Pinckney, Jannie Gathers, Robert Seabrook, Annie Haley Pinckney, Lillian Pinckney Seabrook, Simeon B. Pinckney, Jr., Matthew G. Pinckney, Mary Riley, John Riley, Richard Riley, Daniel McLeod and all other persons unknown claiming any right title, estate, interest, or lien upon the real estate tracts described in the Complaint therein, Defendants, Of whom Daniel Duggan is Respondent.

Notice:

Subsequent History: Rehearing denied by Robinson v. Est. of Harris, 2008 S.C. App. LEXIS 325 (S.C. Ct. App., June 26, 2008)

Related proceeding at Robinson v. Estate of Harris, 2008 S.C. App. Unpub. LEXIS 102 (S.C. Ct. App., Nov. 24, 2008)

Writ of certiorari granted Robinson v. Est. of Harris, 2009 S.C. LEXIS 127 (S.C., Apr. 10, 2009)

Affirmed by Robinson v. Estate of Harris, 2010 S.C. LEXIS 338 (S.C., Oct. 25, 2010)

Prior History: [***1] Appeal From Charleston County. R. Markley Dennis, Jr., Circuit Court Judge.

Disposition: AFFIRMED.

Core Terms

notice, summary judgment, foreclosure, bona fide purchaser, judicial sale, res judicata, proceedings, foreclosure judgment, foreclosure action, incompetent, parties

Case Summary

Procedural Posture

The Charleston County Circuit Court (South Carolina) entered a judgment that granted summary judgment to respondent purchaser after appellant potential property owners filed an action to quiet title. The potential property owners appealed.

Overview

Two people acquired a specific parcel of property pursuant to a judgment of foreclosure and sale. One of those people eventually acquired the other person's interest in it. That person then sold that parcel to the purchaser. The potential property owners later filed a quiet title action and requested that the foreclosure be set aside. The purchaser asserted as an affirmative defense, *inter alia*, S.C. Code Ann. § 15-39-870, regarding his status as a bona fide purchaser for value without notice of adverse claims. After the purchaser was granted summary judgment on that defense, the appellate court found that the requirements of S.C. Code Ann. § 15-39-870 were met. It so concluded because it found that the evidence submitted showed that the sale was made by a court of competent jurisdiction and that the relevant documents, all matters of public record, were properly executed. As a result, it found the purchaser was a bona fide purchaser for value and without notice. It rejected a claim set forth in affidavits that the foreclosure sale should be set aside because the mortgagors were incompetent since none of the affidavits were matters of record at the time of the foreclosure sale.

Outcome

The appellate court affirmed the trial court's judgment.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgments > Supporting Materials > Discovery Materials
 Civil Procedure > ... > Summary Judgments > Entitlement as Matter of Law > Legal Entitlement
 Civil Procedure > ... > Summary Judgments > Entitlement as Matter of Law > Genuine Disputes
 Civil Procedure > ... > Summary Judgments > Entitlement as Matter of Law > Appropriateness

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.

Contracts Law > Types of Contracts > Bona Fide Purchasers
 Real Property Law > ... > Financing > Foreclosures > Judicial Foreclosures

See S.C. Code Ann. § 15-39-870 (2005).

Real Property Law > ... > Financing > Foreclosures > Judicial Foreclosures
 Contracts Law > Types of Contracts > Bona Fide Purchasers

378 S.C. 140, *140; 662 S.E.2d 420, **420; 2008 S.C. App. LEXIS 66, ***1

In furtherance of public policy, a purchaser in good faith at a judicial sale is not affected by irregularities in the proceedings or even error in the judgment under which the sale is made, but is required at his peril only to make inquiry as to the jurisdiction of the court which ordered the sale, and whether all proper parties were before the court when the order was made.

Contracts Law > Types of Contracts > Bona Fide Purchasers
Real Property Law > ... > Title Quality > Adverse Claim Actions > Quiet Title Actions

To claim the status of a bona fide purchaser, a party must show (1) actual payment of the purchase price of the property, (2) acquisition of legal title to the property, or the best right to it, and (3) a bona fide purchase, i.e., in good faith and with integrity of dealing, without notice of a lien or defect. In addition, the bona fide purchaser must show all three conditions--actual payment, acquiring of legal title, and bona fide purchase--occurred before he had notice of a title defect or other adverse claim, lien, or interest in the property.

Counsel: George J. Morris and Walter Bilbro, Jr., both of Charleston, for Appellants.

Louis H. Lang, of Columbia, for Respondent.

Judges: THOMAS, J. HEARN, C.J., and ANDERSON, J., concur.

Opinion by: THOMAS

Opinion

[*142] [**421] THOMAS, J.: In this action to quiet title, Kathleen Brown, along with the other named appellants, appeals an order granting summary judgment to Daniel Duggan. We affirm.¹

FACTS

Appellants filed a complaint and lis pendens on February 1, 2005, to quiet title to approximately 28.6 acres of heirs' property. On January 24, 2006, both the complaint and lis pendens were amended to list numerous other parties with potential claims to the property.

[*143] Identified as part of the 28.6 acres was a 0.540-acre parcel (the Duggan Property) conveyed by Robert L. Tuttle to Duggan in 2003. Tuttle and Christl Gehring acquired the Duggan Property in 2002 pursuant to a judgment of foreclosure and sale in 2000. Shortly after the judicial sale, Gehring conveyed her interest in the property to Tuttle.

In their amended complaint, Appellants requested the 2000 foreclosure be set aside [***2] because of ineffective service of process on Kathleen and Bobbie L. Brown, the mortgagors of Duggan Property when it went into foreclosure. On April 27, 2005, Duggan filed an answer in which he asserted various affirmative defenses, including the doctrines of res judicata and collateral estoppel and his status as a bona fide purchaser for value without notice. On February 28, 2006, Duggan filed a return and joinder to a summary judgment motion filed by two other defen-

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

378 S.C. 140, *143; 662 S.E.2d 420, **421; 2008 S.C. App. LEXIS 66, ***2

dants in the case.² In his return and joinder, Duggan again asserted as affirmative defenses section 15-39-870, his status as a bona fide purchaser for value without notice, and the doctrines of res judicata and collateral estoppel.

In response to Duggan's summary judgment motion, Appellants submitted an affidavit from Keith Brown, Kathleen Brown's son, challenging statements in the affidavits of [**422] service filed in the 2000 foreclosure action that he was served on behalf of Kathleen and Bobbie Brown. Specifically, Keith stated that he was not the person served and that both Kathleen and Bobbie, respectively [***3] his mother and sister, were incompetent at the time of the foreclosure action and subsequent sale. Appellants also submitted affidavits from two relatives who supported Keith's assertion that Kathleen and Bobbie were incompetent.

The trial judge found Appellants' complaint about "irregularities in the proceedings" could not overcome the "clear statutory imperative" of section 15-39-870, under which the doctrine of res judicata would protect a bona fide purchaser for value without notice. Accordingly, summary judgment was granted to Duggan. This appeal followed.

[*144] STANDARD OF REVIEW

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Moore v. Weinberg, 373 S.C. 209, 215-16, 644 S.E.2d 740 743 (Ct. App. 2007). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Id. "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment [***4] should be granted." Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

LAW/ANALYSIS

Appellants argue the grant of summary judgment to Duggan was error because evidence of ineffective service of process on Kathleen and Bobbie in the foreclosure proceeding warranted reopening the 2000 foreclosure action and setting aside the subsequent sale of the Duggan Property. We disagree.

South Carolina Code section 15-39-870 provides as follows:

Upon the execution and delivery by the proper officer of the court of a deed for any property sold at a judicial sale under a decree of a court of competent jurisdiction that proceedings under which such sale is made shall be deemed res judicata as to any and all bona fide purchasers for value without notice, notwithstanding such sale may not subsequently be confirmed by the court.

S.C. Code Ann. § 15-39-870 (2005). The rationale for the statute is the well established public policy of protecting good faith purchasers and upholding the finality of a judicial sale. See Cumbie v. Newberry, 251 S.C. 33, 37, 159 S.E.2d 915, 917 (1968) (stating "a sound public policy requires the validity of judicial sales be upheld, if in reason and justice [***5] it can be done"); Wooten v. Seanch, 187 S.C. 219, 222, 196 S.E. 877, 878 (1937) (upholding a foreclosure sale in which the mortgagee purchased the property sold and further stating that, to set aside a sale, "there

² Defendants Lisa M. Shogry-Savage and David Savage moved for summary judgment, and Duggan joined in their motion.

378 S.C. 140, *144; 662 S.E.2d 420, **422; 2008 S.C. App. LEXIS 66, ***5

must be such irregularity in the proceedings [*145] as to show that the sale was not fairly made, or that appellant was defrauded or misled to his injury and loss").

In Cumbe v. Newberry, the defaulting mortgagor received notice that his foreclosed land was to be sold at public auction. When the first bidder did not complete the sale, the land was sold at a subsequent auction. Notice of the second auction was published, but the defaulting mortgagor did not receive personal notice. The defaulting mortgagor sought to rescind the sale, arguing lack of personal jurisdiction. The supreme court stated:

In furtherance of [public policy] . . . a purchaser in good faith at a judicial sale is not affected by irregularities in the proceedings or even error in the judgment under which the sale is made; but is required at his peril only to make inquiry as to the jurisdiction of the court which ordered the sale, and whether all proper parties were before the court when the order was made.

Cumbe, 251 S.C. at 37, 159 S.E.2d at 917 [***6] (citations omitted); see also 27 S.C. Jur. Mortgages § 125 (1996) ("Foreclosure proceedings are res judicata as to any bona fide purchaser for value without notice, even [**423] though the sale is not later confirmed by the court.").

We hold the requirements of section 15-39-870 were satisfied in this case. First, the Master had competent jurisdiction to execute and deliver the deed to the Duggan Property pursuant to the judgment of foreclosure and sale by a "court of competent jurisdiction." In support of his motion for summary judgment, Duggan submitted a series of documents, all of which were matters of public record, indicating the judgment of foreclosure and sale and subsequent exchanges of title to the Duggan property were properly executed. Included in the documents was the judgment of foreclosure and sale. The judgment stated (1) service was made upon defendants, Kathleen and Bobbie; (2) both Kathleen and Bobbie were in default; (3) the attorneys of record were notified of the hearing; and (4) neither Kathleen nor Bobbie was in the United States military service. The judgment further indicated the property was to be sold by the Charleston County Master-in-Equity and listed the terms [***7] of the sale. Duggan also provided a deed from the Master conveying the property [*146] to Tuttle and Gehring and indicating the property was sold pursuant to the judgment of foreclosure and sale.

Second, Duggan was a bona fide purchaser without notice. To claim the status of a bona fide purchaser, a party must show (1) actual payment of the purchase price of the property, (2) acquisition of legal title to the property, or the best right to it, and (3) a bona fide purchase, "i.e., in good faith and with integrity of dealing, without notice of a lien or defect." Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006). In addition, "[t]he bona fide purchaser must show all three conditions--actual payment, acquiring of legal title, and bona fide purchase--occurred before he had notice of a title defect or other adverse claim, lien, or interest in the property." Id., 628 S.E.2d at 875.

There appears to be no dispute that Duggan satisfied the first two conditions. Appellants, however, claim the Master lacked jurisdiction to sell the Duggan Property because of defects in service, as evidenced by the affidavit of Keith Brown, in which he denied receiving service copies of the foreclosure [***8] papers that were to be served on Kathleen and Bobbie, and the affidavits from Brown and other relatives stating Kathleen and Bobbie were incompetent. Based on these affidavits, Appellants assert Kathleen and Bobbie were never properly notified of the underlying foreclosure proceeding as required by Rule 4(d)(2) of the South Carolina Rules of Civil Procedure. None of these affidavits, however, were matters of record at the time of the foreclosure sale.

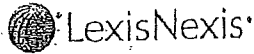
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Appellants also argue Duggan presented no evidence that proper newspaper publication of the foreclosure sale occurred or that John Doe or Jane Doe was named in the foreclosure action to represent unknown parties, minors, incompetents, or persons who could possibly be in the military, apparently suggesting these omissions should have alerted Duggan that lawful service of process on all necessary parties was lacking. We, however, have found no specific rulings in the appealed order on Appellants' arguments concerning lack of newspaper publication or the failure to name all necessary defendants in the foreclosure, and there is no indication that Appellants moved to alter or amend on either of these grounds; therefore, these issues are not [***9] preserved for appeal. [*147] *See Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding that, when the trial court does not explicitly rule on an issue at trial and the appellant fails to move to alter or amend the judgment on that ground, the issue is not properly before the appellate court and should not be addressed). Moreover, there is no evidence that either Duggan or his predecessors-in-title had notice, constructive or otherwise, of Appellants' claims that Kathleen and Bobbie were incompetent and were not properly served in the foreclosure action. Pursuant to section 15-39-870, then, we hold Duggan's title is not affected by Appellants' claims of defective service of process in the foreclosure action.

In light of our disposition, we need not address Duggan's arguments concerning laches and abandonment as additional reasons to uphold the grant of summary judgment. *See Whiteside v. Cherokee County* [***424] *Sch. Dist. No. One*, 311 S.C. 335, 340-41, 428 S.E.2d 886, 889 (1993) (explaining the appellate court need not address a remaining issue when resolution of a prior issue is dispositive).

AFFIRMED.

HEARN, C.J., and ANDERSON, J., concur.



Neutral
As of: May 9, 2012 9:56 AM EDT

Wells Fargo Bank, NA v. Turner

Court of Appeals of South Carolina

March 1, 2008, Submitted; April 23, 2008, Filed

Opinion No. 4376

Reporter: 378 S.C. 147; 662 S.E.2d 424; 2008 S.C. App. LEXIS 69

Wells Fargo Bank, NA, as trustee for the benefit of the certificate holders of asset-backed pass-through certificates series 2004-WCWI, Respondents, v. Barbara S. Turner, Defendant Richard S. Freeman, Foreclosure Bidder, Appellant.

Notice:

Subsequent History: Rehearing denied by *Fargo v. Turner*, 2008 S.C. App. LEXIS 326 (S.C. Ct. App., June 26, 2008)
Writ of certiorari denied Wells Fargo v. Turner, 2009 S.C. LEXIS 218 (S.C., Feb. 4, 2009)

Prior History: [***1] Appeal From Bamberg County. Richard B. Ness, Special Referee for Bamberg County.

Disposition: AFFIRMED.

Core Terms

judicial sale, mortgage, sale price, conscience, shock, property value, foreclosure, bid, special referee, grossly, excusable neglect, notice

Case Summary

Procedural Posture

Respondent bank sought to set aside a foreclosure sale to appellant bidder. A Bamberg County (South Carolina) special referee entered an order setting aside the sale on the ground that the sale price was so grossly inadequate so as to shock the conscience. The bidder appealed. He argued that the bank failed to present evidence as to the value of the property.

Overview

The referee found that the original amount of the foreclosed note and mortgage was \$82,025. The successful bid was \$3,000. The court stated that a judicial sale would be set aside when the sale price was so gross as to shock the conscience. Here, the high bid was only 3.65 percent of the original principal amount of the foreclosed note and mortgage. The amount of the foreclosed note and mortgage was evidence of the property's value. Although the note and mortgage were not presented as evidence at the hearing on the motion to set aside the sale, they were ad-

378 S.C. 147, *147; 662 S.E.2d 424, **424; 2008 S.C. App. LEXIS 69, ***1

mitted into evidence at the initial hearing regarding the default proceedings against the mortgagor, and they were attached to the original summons and complaint instituting the action. A purchaser at a judicial sale was deemed to have notice of all things disclosed by the record. Furthermore, the bidder testified that he was prepared to bid up to \$75,000 for the property. This testimony was also evidence of the value of the property. Accordingly, the record contained sufficient evidence of the value of the property to support the decision of the special referee that the bid was so grossly inadequate as to shock the conscience.

Outcome

The court affirmed the judgment.

LexisNexis® Headnotes

Real Property Law > ... > Financing > Foreclosures > Judicial Foreclosures
Evidence > Burdens of Proof > Preponderance of Evidence
Civil Procedure > Judicial Officers > Judges > Discretionary Powers
Civil Procedure > Appeals > Standards of Review > General Overview

A mortgage foreclosure is an action in equity. An appellate court's scope of review of a case heard by a master who enters a final judgment is to determine facts in accordance with its own view of the preponderance of the evidence. However, the determination of whether a judicial sale should be set aside is a matter left to the sound discretion of the trial court.

Real Property Law > ... > Financing > Foreclosures > Judicial Foreclosures

A judicial sale will be set aside when either: (1) the sale price is so gross as to shock the conscience or (2) the sale is accompanied by other circumstances warranting the interference of the court. Courts have set aside judicial sales based on grossly inadequate sales prices.

Real Property Law > Overview & Legal Concepts > Property Valuations
Real Property Law > ... > Financing > Foreclosures > General Overview

The amount of the foreclosed note and mortgage is evidence of the property's value.

Real Property Law > ... > Financing > Foreclosures > Judicial Foreclosures

A purchaser at a judicial sale is deemed to have notice of all things disclosed by the record.

Real Property Law > ... > Financing > Foreclosures > General Overview

The sale and terms of a foreclosure are ordered and dictated by the Judgment of Foreclosure and Notice of Sale, which are both a matter of public record.

Real Property Law > Overview & Legal Concepts > Property Valuations

Fair market value is the amount at which property would change hands between a willing buyer and willing seller.

Real Property Law > ... > Financing > Foreclosures > Judicial Foreclosures

A party does not have to prove excusable neglect if a judicial sale is found to shock the conscience; rather, a showing of excusable neglect is only required when a party is seeking to have a judicial sale set aside because the sale is accompanied by other circumstances warranting the interference of the court.

378 S.C. 147, *147; 662 S.E.2d 424, **424; 2008 S.C. App. LEXIS 69, ***1

Civil Procedure > Appeals > Standards of Review > General Overview

An appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal.

Counsel: R. Bentz Kirby, of Orangeburg, and Glenn Walters, of Orangeburg, for Appellant.

April L. Gremillion, of Columbia, for Respondents.

Judges: HEARN, C.J. PIEPER, J., and CURETON, A.J., concur.

Opinion by: HEARN

Opinion

[*149] [**425] HEARN, C.J.: Richard Freeman appeals the special referee's order setting aside a judicial sale. Freeman contends Wells Fargo Bank, NA (the Bank) failed to meet its burden of proof to vacate the sale because it failed to present evidence as to the value of the property. We affirm.

FACTS

The Bank obtained a mortgage from Barbara Turner in the amount of \$ 82,025 on real property located in Bamberg County, South Carolina. When Turner failed to make her payments, the Bank sought foreclosure of the mortgage, and the case was referred to a special referee. In July of 2005, the referee held a hearing on the merits, as evidenced by a written transcript of testimony submitted in the record. Turner did not attend the hearing, and was ultimately found in default. The referee found the debt due to the Bank totaled \$ 86,565.13, and ordered the property sold at public auction.

At the public auction, Freeman submitted the highest, [***2] and ultimately successful bid of \$ 3,000 for the property. Thereafter, the Bank served Freeman with a Motion to Set Aside and Vacate Sale. The Bank argued the sale should be set aside because: (1) the Bank's attorney failed to take all necessary steps to ensure the Bank would have a representative present [*150] and prepared to bid at the sale; and (2) the successful bid of \$ 3,000.00 was so low as to shock the conscience of the court.

The special referee granted the Bank's motion, concluding Freeman's bid of \$ 3,000 amounted to only 3.65% of the property value, and therefore, constituted a grossly inadequate sale price that shocks the conscience under the test set forth in Poole v. Jefferson Standard Life Ins. Co., 174 S.C. 150, 157, 177 S.E. 24, 27 (1934). The referee declined to address the Bank's other arguments, including the existence of "circumstances warranting court interference," finding it was unnecessary to do so, given the gross inadequacy of the sale price. Subsequently, Freeman filed a Rule 59(e), SCRCP, motion to alter or amend the judgment. The special referee denied the motion, and this appeal followed.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity. Our [***3] scope of review of a case heard by a master who enters a final judgment is to determine facts in accordance with our own view of the pre-

378 S.C. 147, *150; 662 S.E.2d 424, **425; 2008 S.C. App. LEXIS 69, ***3

ponderance of the evidence." E. Sav. Bank, FSB v. Sanders, 373 S.C. 349, 354, 644 S.E.2d 802, 805 (2007) (quoting Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997)). However, the determination of whether a judicial sale should be set aside is a matter left to the sound discretion of the trial court. Investors Sav. Bank v. Phelps, 303 S.C. 15, 17, 397 S.E.2d 780, 781 (Ct. App. 1990).

LAW/ANALYSIS

Freeman asserts the special referee erred in finding the Bank had met its burden of proof in order to vacate the foreclosure sale. Specifically, Freeman asserts the Bank failed to prove the value of the property. We disagree.

A judicial sale will be set aside when either: (1) the sale price "is so gross as to shock the conscience[;]" or (2) the sale "is accompanied by other circumstances warranting the interference of the court." Poole, 174 S.C. at 157, 177 S.E. at 27. In Poole, the court set aside a sale on the ground that the highest bid price, which amounted to approximately 12.5% of the property value, was so grossly inadequate [***4] that it shocked [*151] the court's conscience. Since the opinion in Poole, our courts have continued to set aside judicial sales based on "grossly inadequate" sales prices. See Investors Sav. Bank v. Phelps, 303 S.C. 15, 397 S.E.2d 780 (Ct. App. 1990) (stating that sales prices amounting to 4.2%, 4.4%, and less than 10% of the property value all fall within the [**426] percentage range of a grossly inadequate sales price).

In the case before us, the special referee found the original amount of the foreclosed note and mortgage was \$ 82,025, and that the total debt due to the Bank under the note and mortgage, as of July 7, 2005, was \$ 86,563.13. As a result, the court concluded Freeman's high bid of \$ 3,000 was only 3.65% of the original principal amount of the foreclosed note and mortgage. This, the court found, constituted a grossly inadequate sale price that shocked the conscience under the Poole test.

The amount of the foreclosed note and mortgage are evidence of the property's value. Investors Savings Bank v. Phelps, 303 S.C. 15, 18-19, 397 S.E.2d 780, 782 (Ct. App. 1990). Although the note and mortgage were not presented as evidence at the hearing on the motion to set aside the sale, they were [***5] admitted into evidence at the initial hearing regarding the default proceedings against Turner, and they were attached to the original summons and complaint instituting the action. A purchaser at a judicial sale is deemed to have notice of all things disclosed by the record. See Ex parte Keller, 185 S.C. 283, 293, 194 S.E. 15, 19 (1937) (Even though judicial sale purchaser was not a party to the action originally, as a purchaser at the sale, he made himself a party to the suit, and is assumed to have notice of all things disclosed by the record.). Additionally, the sale and terms of a foreclosure are ordered and dictated by the Judgment of Foreclosure and Notice of Sale, which are both a matter of public record.

Moreover, Freeman testified at the hearing on the motion to set aside the sale that he was prepared to bid up to \$ 75,000.00 for the property. Fair market value is the amount at which property would change hands between a willing buyer and willing seller. Black's Law Dictionary 597 (6th ed, [*152] 1990). Therefore Freeman's testimony is also evidence of the value of the property.¹

¹ Freeman also asserts the lower court applied the wrong legal standard because it did not require the [***6] Bank to prove excusable neglect. However, a party does not have to prove excusable neglect if the judicial sale is found to shock the conscience; rather a showing of excusable neglect is only required when a party is seeking to have a judicial sale set aside based on the second prong of the Poole test. Poole, 174 S.C. at 157, 177 S.E. at 27. Here, we need not address Freeman's remaining arguments because we find the sale was properly set aside based on the first prong of Poole. See Futch v. McAllister Towing of George-

378 S.C. 147, *152; 662 S.E.2d 424, **426; 2008 S.C. App. LEXIS 69, ***6

CONCLUSION

We hold the record contains sufficient evidence of the value of the property to support the decision of the special referee that Freeman's bid was so grossly inadequate as to shock the conscience. Accordingly, the order of the special referee is

AFFIRMED.

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PIEPER, J., and CURETON, A.J., concur.

town, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

² We decide this case without oral argument pursuant to Rule 215, SCACR.

A. Settlement Statement

U.S. Department of Housing
and Urban Development

OMB Approval No. 2502-0285
(expires 11/30/2009)

B. Type of Loan		6. File Number	7. Loan Number	8. Mortgage Insurance Case Number
1. ☐ FHA 2. ☐ FmHA 3. ☐ Conv. Unins. 4. ☐ VA 5. ☐ Conv. Ins.		7XINGERBUT-55		
C. Note: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.				
D. Name & Address of Borrower:		E. Name & Address of Seller:		F. Name & Address of Lender:
DAVID L. FINGERHUT 63 SHIPYARD DRIVE, #905 HILTON HEAD ISLAND, SC 29928 PATRICIA M. SANTRY 63 SHIPYARD DRIVE, #906 HILTON HEAD ISLAND, SC 29928		MASTER IN EQUITY, BEAUFORT COUNTY 102 RIBAUT ROAD ROOM 212 BEAUFORT, SC 29901		
G. Property Location:		H. Settlement Agent:		I. Settlement Date:
LOT 55 BLOODY POINT DAUFUSKIE ISLAND, SC 29916 BEAUFORT County		FINGER & FRASER, P.A. TIN: 57-0951729 Place of Settlement: P. O. BOX 24006 HILTON HEAD ISLAND, SC 29925		01/09/2012
J. Summary of Borrower's Transaction		K. Summary of Seller's Transaction		
100. Gross Amount Due From Borrower		400. Gross Amount Due To Seller		
		\$8,800.00		
101. Contract sales price		401. Contract sales price		
		\$8,800.00		
102. Personal property		402. Personal property		
103. Settlement charges to borrower (line 1400)		403.		
104.		404.		
		405.		
105.		406.		
Adjustments for items paid by seller in advance		Adjustments for items paid by seller in advance		
106. City/town taxes to		406. City/town taxes to		
107. County taxes to		407. County taxes to		
108. Assessments to		408. Assessments to		
109. BLOODY POINT POA 1/9-12/31		409.		
		410.		
110.		411.		
111. 2011 TAXES		412.		
112. GW SERVICES PROCESS FEE				
120. Gross Amount Due From Borrower		420. Gross Amount Due To Seller		
		\$8,800.00		
200. Amounts Paid By Or In Behalf Of Borrower		500. Reductions in Amount Due To Seller		
		\$8,800.00		
201. Deposit or earnest money		501. Excess deposit (see instructions)		
202. Principal amount of new loan(s)		502. Settlement charges to seller (line 1400)		
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to		
204.		504. Payoff of first mortgage loan		
		505. Payoff of second mortgage loan		
205.		506.		
206.		507.		
207.		508.		
208.		509.		
209.		Adjustments for items unpaid by seller		
Adjustments for items unpaid by seller		510. City/town taxes to		
210. City/town taxes to				
		511. County taxes to		
211. County taxes to				
212. Assessments to		512. Assessments to		
213.		513.		
214.		514.		
215.		515.		
216.		516.		
217.		517.		
218.		518.		
219.		519.		
220. Total Paid By/For Borrower		520. Total Reduction Amount Due Seller		
		\$8,800.00		
300. Cash At Settlement From/To Borrower		600. Cash At Settlement To/From Seller		
		\$8,800.00		
301. Gross amount due from borrower (line 120)		601. Gross amount due to seller (line 420)		
302. Less amount paid by/for borrower (line 220)		602. Less reductions in amt. due seller (line 520)		
303. Cash ☒ From ☐ To Borrower		603. Cash ☐ To ☐ From Seller		

Section 5 of the Real Estate Settlement Procedures Act (RESPA) requires the following: HUD must develop a Special Information Booklet to help persons borrowing money to finance the purchase of residential real estate to better understand the nature and costs of residential real estate settlement services; Each lender must provide the booklet to all applicants from whom it receives or for whom it prepares a written application to borrow money to finance the purchase of residential real estate; Lenders must prepare and distribute with the booklet a Good Faith Estimate of the settlement costs that the borrower is likely to incur in connection with the settlement. These disclosures are mandatory.

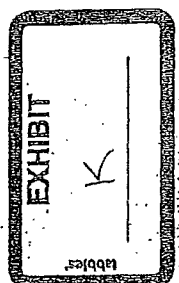
Section 4(a) of RESPA mandates that HUD develop and prescribe this standard form to be used at the time of loan settlement to provide full disclosure of all charges imposed upon the borrower and seller. These are third party disclosures that are designed to provide the borrower with pertinent information during the settlement process in order to be a better shopper.

The Public Reporting Burden for this collection of information is estimated to average one hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number.

The information requested does not lend itself to confidentiality.

Form HUD-1 (3/66)
not Handbook 4305.2



L. Settlement Charges				Paid From Borrower's Funds at Settlement	Paid From Seller's Funds at Settlement
700. Total Sales/Broker's Commission based on price		\$0,800.00 @	1/4%		
Division of Commission (line 700) as follows:					
701.	to				
702.	to				
703. Commission paid at Settlement					
704.					
800. Items Payable in Connection With Loan					
801. Loan Origination Fee	%				
802. Loan Discount	%				
803. Appraisal Fee	to				
804. Credit Report	to				
805. Lender's Inspection Fee					
806. Mortgage Insurance Application Fee to					
807. Assumption Fee					
808.					
809.					
810.					
811.					
812.					
813.					
814.					
815.					
816.					
817.					
818.					
819.					
820.					
900. Items Required By Lender To Be Paid In Advance					
901. Interest from	01/01/2012 to	02/01/2012 @	/day		
902. Mortgage Insurance Premium for	months to				
903. Hazard Insurance Premium for	years to				
904.	years to				
905.					
1000. Reserves Deposited With Lender					
1001. Hazard Insurance	months @		per month		
1002. Mortgage Insurance	months @		per month		
1003. City property taxes	months @		per month		
1004. County property taxes	months @		per month		
1005. Annual assessments	months @		per month		
1006.	months @		per month		
1007.	months @		per month		
1008.	months @		per month		
1009. Aggregate Accounting Escrow Adjustment				\$0.00	
1100. Title Charges					
1101. Settlement or closing fee	to	FINGER & FRASER, P.A.		\$175.00	
1102. Abstract or title search	to	ADVANTAGE TITLE ABSTRACTING - UPRATED			
1103. Title examination	to				
1104. Title Insurance binder	to				
1105. Document preparation	to				
1106. Notary fees	to			\$500.00	
1107. Attorney's fees	to	FINGER & FRASER, P.A.			
(includes above items numbers: 1103, 1105, 1106)					
1108. Title Insurance	to	FIRST AMERICAN TITLE INS. CO.		\$100.00	
(includes above items numbers: 404-FAT, 604-FIT)					
1109. Lender's coverage					
1110. Owner's coverage					
1111.					
1112.					
1113.					
1200. Government Recording and Transfer Charges					
1201. Recording cost: Deed	\$10.00	Mortgage	Releases	\$10.00	
1202. City/county tax/stamps: Deed		Mortgage			
1203. State tax/stamps: Deed	\$32.56	Mortgage	Other	\$32.56	
1204.					
1205.					
1300. Additional Settlement Charges					
1301. Survey	to				
1302. Fast Inspection	to				
1303.					
1304.					
1305.					
1306.					
1307.					
1400. Total Settlement Charges (enter on lines 103, Section J and 602, Section K)				\$917.56	

Certification

(continued from HUD-1)

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

Borrower: DAVID L. FINGERHUT Date: _____
63 SHIPYARD DRIVE, #905
HILTON HEAD ISLAND, SC 29928

Seller or Agent: MARVIN H. DUKES III Date: _____
MASTER IN EQUITY, BEAUFORT COUNTY
102 RIBAUT ROAD ROOM 212
BEAUFORT, SC 29901

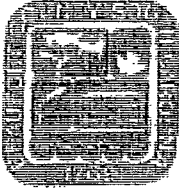
Borrower: PATRICIA M. SANTRY Date: _____
63 SHIPYARD DRIVE, #905
HILTON HEAD ISLAND, SC 29928

Seller or Agent: _____ Date: _____

The HUD-1 Settlement which I have prepared is a true and accurate account of this transaction. I have caused or will cause the funds to be disbursed in accordance with this statement.

Date: _____ Settlement Agent: JULIE A. SERAFINO Date: _____
FINGER & FRASER, P.A.
P. O. BOX 24005
HILTON HEAD ISLAND, SC 29925

WARNING: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine and imprisonment. For details see: Title 18 U.S. Code Section 1001 and Section 1010.



Joy Logan
BEAUFORT COUNTY TREASURER
P.O. Drawer 487
Beaufort, South Carolina 29901-0487
(843) 470-2764; FAX (843) 470-2773
BIDDER REDEMPTION NOTIFICATION
TAX SALE OCTOBER 4, 2010

Date: 11-17-2010

STONO TITLE LLC

5461 5TH FAIRWAY DR.

HOLLYWOOD, SC 29449

Owner name: WILLIAM A. & MICHELE C. ASHTON
Acct #R800-027-00A-0055-0000

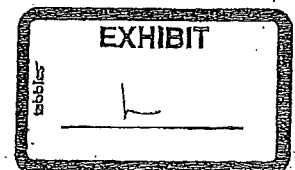
This is to notify you that the above referenced property that was sold to you at the 2010
Delinquent Tax Sale on October 4, 2010 has been redeemed. Please return the ORIGINAL
TAX SALE RECEIPT to our office and a check will be issued to you in the amount of
\$10,300.00

Bid Amount:	<u>\$ 10,000.00</u>
<u>3</u> % Bidders Statutory Cap Interest:	<u>\$ 300.00</u>
MH Rent Due Bidder:	<u>\$.00</u>
Additional Cost:	<u>\$.00</u>
Total Amount of Check:	<u>\$ 10,300.00</u> ✓ \$

This property is located in district 800. This to certify that the above
property was redeemed this 10th day of November, 2010, by the above
Interested party/or in the name of the original owner.

Joy Logan, Treasurer

Herschel J. Evans, Deputy Treasurer



STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Bloody Point Property Owners' Association, Inc.,

Plaintiff,

vs.

William A. Ashton, Jr. and Michele C. Ashton,

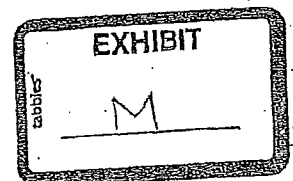
Defendants.

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2011-CP-07-2176

) AFFIDAVIT OF DAVID FINGERHUT

PERSONALLY APPEARED before me, David Fingerhut, who, being duly sworn,
alleges and says as follows:

1. I am over 18 years of age, am competent to provide my testimony and affirm that the representations made below are based on my own personal knowledge.
2. I am an attorney, licensed to practice law in the States of New York and New Jersey and have specialized in the practice of real estate law for over twenty-five years. Since permanently moving to Beaufort County in 2008, I have continued to practice law in New York (albeit on a long distance basis), but have -- together with my wife, Patricia Santry -- also started investing in local properties with the goal of long term capital appreciation. My wife and I currently own seven properties in Beaufort County, three of which were purchased at Master in Equity auctions.
3. I reviewed the notice of foreclosure sale for Lot #55, Daufuskie Island Club Phase I, Bloody Point ("Property") and attended the foreclosure sale held on January 3, 2012.



4. There were approximately fifty bidders attending the foreclosure sale on that day with active bidding on many of the available properties, yet other than the Plaintiff, I was the only bidder on the Property.

5. Patricia Santry and I were the successful bidders at the foreclosure sale. We paid \$8,800.00 plus \$2,793.20 for assessments and 2011 property taxes due in exchange for which the Master-in-Equity issued a deed in our names.

6. At the time of the foreclosure sale, I was not aware of any defect in the foreclosure proceedings, nor am I aware of any such defect today.

7. After successfully purchasing the Property at the foreclosure sale, I attempted to obtain title insurance to protect my interest in the Property. In my professional experience, the purchase of title insurance in a real estate transaction is essential. My wife and I have title insurance on every property that we own in Beaufort County. In fact, we have had title insurance on all real property that we have ever owned.

8. On the instant sale, my attorney informed me that I could not obtain a policy in excess of the bid price unless I obtained a fair market appraisal of the Property.

9. Since I believed the auction price to be a favorable one, my goal was to obtain a title insurance policy in the highest amount possible.

10. We hired Michael J. Whitton of Michael J. Whitton & Associates in Hilton Head Island, South Carolina to perform a fair market appraisal of the Property.

11. We have no personal or business relationship with Mr. Whitton. Frankly, it took quite a while to find a licensed appraiser who was even willing to visit the property at all. We were fortunate to be referred to Mr. Whitton after being turned down by several appraisers who simply had no interest in visiting Daufuskie Island.

12. On January 19, 2012, Mr. Whitton completed his appraisal and assigned a value of \$17,000 to the Property.

13. As a result of the appraisal my wife and I were able to and did obtain a title insurance policy in that amount.

14. When I first learned of the Plaintiffs' claims, well after the closing of title to the Property, I personally conducted an investigation in order to learn who they are and how they could have forfeit their rights to the Property.

15. What I learned as a result of my investigation is that the Plaintiffs, Dr. and Mrs. Ashton, are sophisticated individuals with an intimate knowledge of real estate.

16. In fact, Mrs. Ashton has been a licensed Real Estate Salesperson in the states of Pennsylvania and Delaware since 2001.

17. I learned that Dr. and Mrs. Ashton also lost title to the Property in the 2010 Beaufort County Tax Auction. In that auction, the Property sold for \$10,000.00 to a third party bidder.

18. Given Mrs. Ashton's professional credentials and the above history, her professed confusion (in her affidavit submitted to this Court dated February 29, 2012) about her financial obligations to the Plaintiff strains all credulity.

19. Based upon Dr. and Mrs. Ashton's past actions (and inactions) pertaining to the Property, it seems clear that they received the repeated notices and mailings from the Plaintiff, yet they purposely delayed in the payment of their financial obligations.

20. Dr. and Mrs. Ashton's purposeful delay and avoidance of their well-known financial obligations are the cause of this action as well as the purchase of this property by my wife and me.

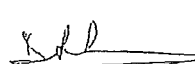
21. We have made a commitment to the long term investment in and maintenance of the Property and do not wish to see it undone by individuals who chronically refuse to honor their financial obligations.

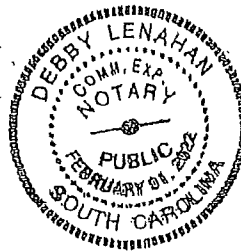
22. It is respectfully requested that this court reject the Defendants' incredible argument that their default was some sort of misunderstanding caused by the Plaintiff or anyone else.

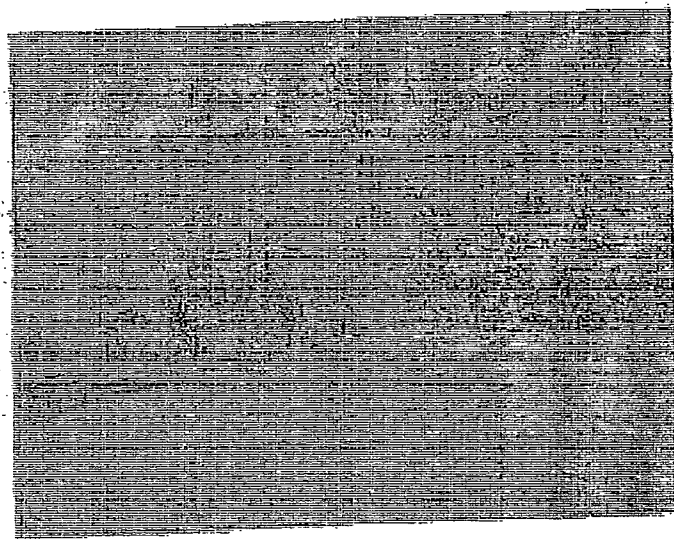
FURTHER AFFIANT SAYETH NOT.


David Fingerhut

Sworn and subscribed before me
this 8th day of May, 2012.


Notary Public for South Carolina
My Commission Expires: Feb 01, 2012





APPRAISAL OF REAL PROPERTY

LOCATED AT:

42 Fuskle Lane
Lot 65, Daufuskie Island Club, Phase I
Daufuskie Island, SC 29915

FOR:

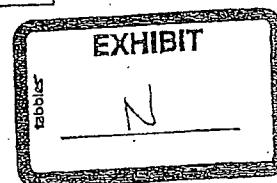
David Fingerhut & Patricia Santry

AS OF:

January 19, 2012

BY:

Michael J. Whitten



SUMMARY OF SALIENT FEATURES

SUBJECT INFORMATION	Subject Address	42 Fuskle Lane
	Legal Description	Lot 55, Daufuskie Island Club, Phase I
	City	Daufuskie Island
	County	Beaufort
	State	SC
	Zip Code	29915
	Census Tract	45-013-111
	Map Reference	Map 27A/Parcel 55
SALE INFORMATION	Sale Price	\$ N/A
	Date of Sale	N/A
CLIENT INFORMATION	Borrower/Client	Not applicable
	Lender	David Fingerhut & Patricia Santry
DESCRIPTION OF IMPROVEMENTS	Size (Square Feet)	
	Price per Square Foot	\$
	Location	Good/Bloody Point
	Age	
	Condition	
	Total Rooms	
	Bedrooms	
	Baths	
APPRAISER INFORMATION	Appraiser	Michael J. Whilton
	Date of Appraised Value	January 19, 2012
VALUE	Opinion of Value	\$ 17,000

File No. L12-001

LAND APPRAISAL SUMMARY REPORT

State: SC Zip Code: 29916

Property Address: 42 Fuskie Lane City: Daufuskie Island
 County: Beaufort Legal Description: Lot 55, Daufuskie Island Club, Phase I

Assessor's Parcel #: R800 027 00A 0055 0000 Tax Year: 2011 R.E. Taxes: \$ 1,670.32 Special Assessments: \$
 Market Area Name: Daufuskie Island Club/Bloody Point Map Reference: Map 27A/Parcel 55 Census Tract: 46-013-111
 Current Owner of Record: David Fingerhut & Patricia Santry Borrower (if applicable): Not applicable HOA: \$ per year per month
 Project Type (if applicable): ☒ PUD ☐ Do Minimis PUD ☐ Other (describe) ☐ Owner ☐ Tenant ☒ Vacant ☐ Not habitable
 Are there any existing improvements to the property? ☒ No ☐ Yes If Yes, indicate current occupancy:
 If Yes, give a brief description:

The purpose of this appraisal is to develop an opinion of: ☒ Market Value (as defined), or ☐ other type of value (describe).
 This report reflects the following value (if not current, see comments): ☒ Current the inspection date is the Effective Date ☐ Retrospective ☐ Prospective
 Property Rights Appraised: ☒ fee Simple ☐ Leasehold ☐ Leased Fee ☐ Other (describe)
 Intended Use: Intended use of this report is for title insurance purposes.

Intended User(s) (by name or type): David Fingerhut & Patricia Santry

Client: David Fingerhut & Patricia Santry Address: 63 Shipyard Drive, Apt. 905, Hilton Head Island, SC, 29928
 Appraiser: Michael J. Whitton Address: P.O. Box 5331, Hilton Head Island, SC 29936

Location:	Characteristics	Predominant Occupancy	One-Unit Housing PRICE (\$000)	AGE (yrs)	Present Land Use	Change in Land Use
☐ Urban	☒ Suburban ☐ Rural	☒ Owner	200	Low	One-Unit 85%	☒ Not Likely
Built up: ☐ Over 75%	☒ 25-75% ☐ Under 25%	☐ Tenant	900	High	2-4 Unit	☐ Likely * ☐ In Process *
Growth rate: ☐ Rapid	☒ Stable ☐ Slow	☐ Vacant (0-5%)	500	Pred	Multi-Unit	
Property values: ☐ Increasing	☒ Stable ☐ Declining	☐ Vacant (>5%)			Comm'l	
Demand/Supply: ☐ Shortage	☐ In Balance ☒ Over Supply				Recreational	
Marketing time: ☐ Under 3 Mos.	☐ 3-6 Mos. ☒ Over 6 Mos.					

Item	Good	Average	Fair	Poor	N/A	Item	Good	Average	Fair	Poor	N/A
Employment Stability	☐	☒	☐	☐	☐	Adequacy of Utilities	☐	☒	☐	☐	☐
Convenience to Employment	☐	☒	☐	☐	☐	Property Compatibility	☐	☒	☐	☐	☐
Convenience to Shopping	☐	☒	☐	☐	☐	Protection from Delinquent Conditions	☐	☒	☐	☐	☐
Convenience to Schools	☐	☒	☐	☐	☐	Police and Fire Protection	☐	☒	☐	☐	☐
Adequacy of Public Transportation	☐	☒	☐	☐	☐	General Appearance of Properties	☐	☒	☐	☐	☐
Recreational Facilities	☒	☐	☐	☐	☐	Appeal to Market	☐	☒	☐	☐	☐

Market Area Comments: Bloody Point is a private planned community located on Daufuskie Island, accessible only by boat. This planned development consists primarily of highly customized detached single family homes. Amenities include a clubhouse, 18-hole golf course, tennis courts, and swimming pool. Appeal is to second homeowners attracted by its privacy.

MARKET CONDITIONS COMMENTS: The local real estate market is dependant upon transient buyers primarily from the northeast and midwest. Due to current economic conditions, activity has decreased causing an oversupply of inventory which in turn increases marketing periods. Additionally, lot prices have declined substantially due to high levels of foreclosures and motivated sellers. Properties that are competitively priced are starting to sell.

Dimensions: 110.02 x 210.03 Site Area: .63 Acres
 Zoning Classification: CP-PUD Description: Community Preservation

Do present improvements comply with existing zoning requirements? ☐ Yes ☐ No ☒ No improvements
 Uses allowed under current zoning: Detached Single Family

Are CC&Rs applicable? ☒ Yes ☐ No ☐ Unknown Have the documents been reviewed? ☐ Yes ☒ No Ground Rent (if applicable) \$ /
 Comments: Improved with a single family residence.

Highest & Best Use as Improved: ☐ Present use, or ☒ Other use (explain) Single Family Site
 Actual Use as of Effective Date: Single Family Site Use as appraised in this report: Single Family Site
 Summary of Highest & Best Use: Highest and best use of subject site is improved with a single family dwelling.

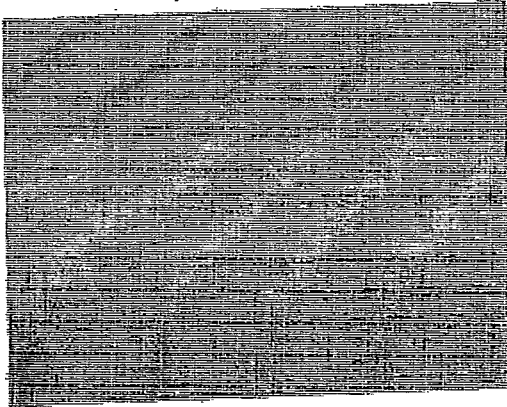
Utilities	Public	Other	Provider/Description	Off-site Improvements	Type	Public	Private	Frontage	Adequate
Electricity	☒	☐		Street	Paved	☐	☒	Topography	Predominantly Level
Gas	☒	☒	Propane Tank	Width	Conforms to Master Plan	☐	☐	Site	Typical of Area
Water	☒	☐		Surface	Asphalt	☐	☐	Shape	Rectangular
Sanitary Sewer	☒	☐		Curb/Gutter	None	☐	☐	Drainage	Appears Adequate
Storm Sewer	☒	☐		Sidewalk	None	☐	☐	View	Golf
Telephone	☒	☐		Street Lights	None	☐	☐		
Multimedia	☒	☐		Alley	None	☐	☐		

Other site elements: ☐ Inside Lot ☐ Corner Lot ☒ Cul de Sac ☒ Underground Utilities ☐ Other (describe)
 FEMA Special Flood Hazard Area: ☒ Yes ☐ No FEMA Flood Zone "A7" FEMA Map # 450026 0130D FEMA Map Date 09/29/88
 Site Comments: Site has minimal tree coverage and a golf view to the rear of the property. Course is currently being renovated due to lack of maintenance.

Subject Photo Page

Subject Photo Page

Borrower/Client	Not applicable				
Property Address	42 Fuskia Lane	County	Beaufort	State	SC
City	Dartuskie Island	Zip Code	29915		
Lender	David Fingerhut & Patricia Santry				



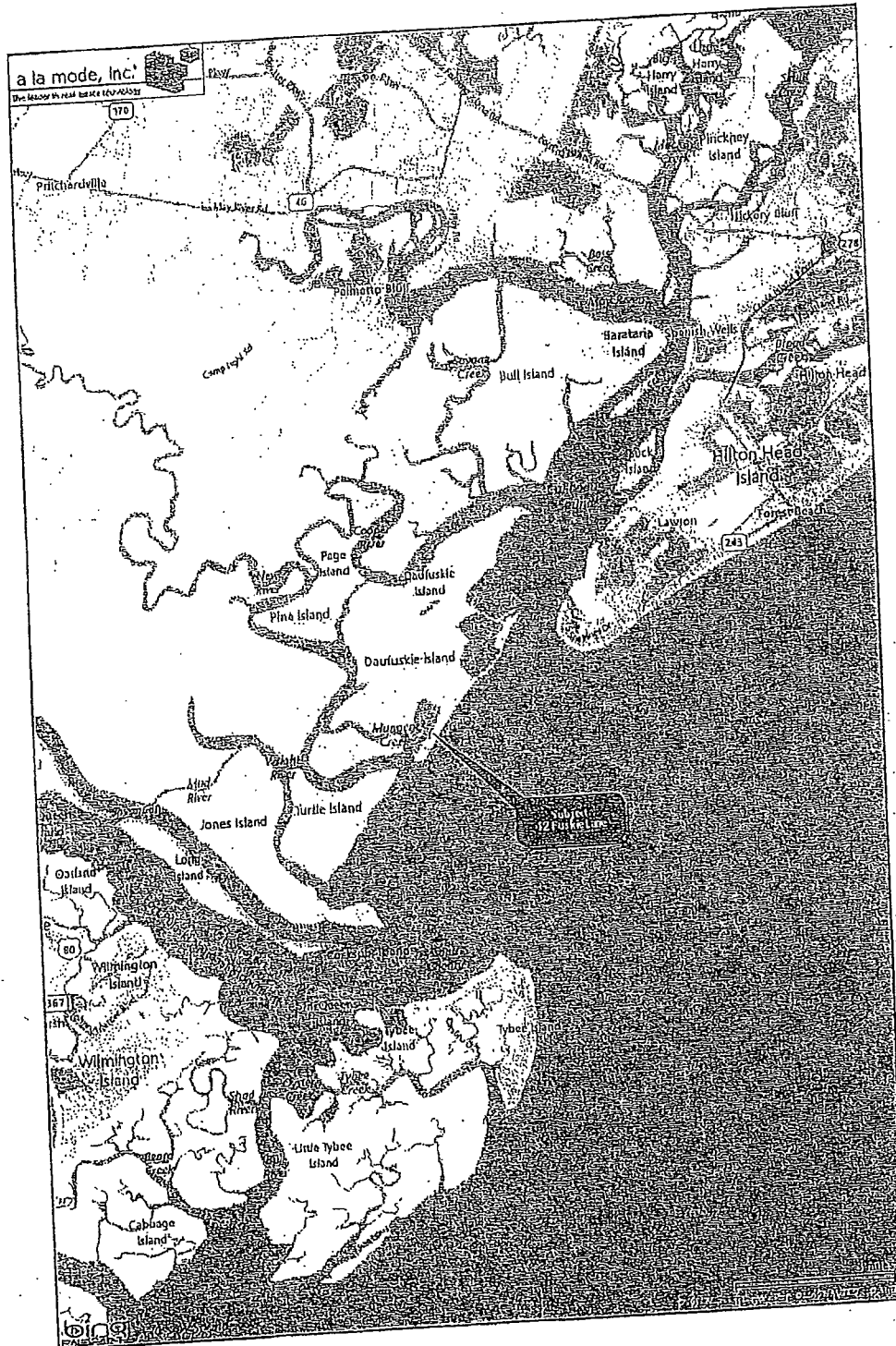
Golf View to Rear

42 Fuskle Lane - Lot 65
 Sales Price N/A
 Gross Living Area
 Total Rooms
 Total Bedrooms
 Total Bathrooms
 Location Good/Bloody Point
 View
 Site .53
 Quality
 Age

Golf View to Rear

Location Map

Borrower/Cient	Not applicable		
Property Address	42 Fuskie Lane	County	Beaufort
City	Oaufuskie Island	State	SC
Lender	David Fingerhut & Patricia Santry	Zip Code	29915

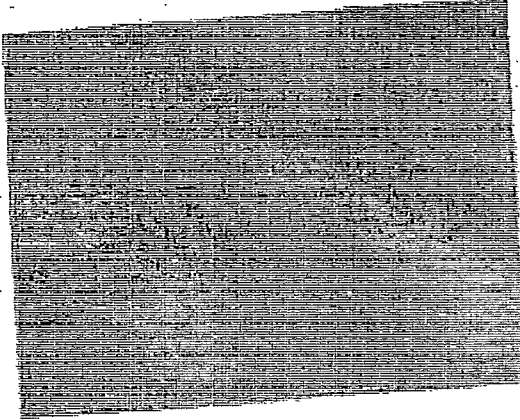


LAND APPRAISAL SUMMARY REPORT

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Subject Photo Page

Borrower/Client:	Not applicable	State	SC	Zip Code	29916
Property Address	42 Fuskla Lane	County	Beaufort		
City	Daufuskie Island				
Lender	David Fingerhut & Patricia Santry				



Subject Front

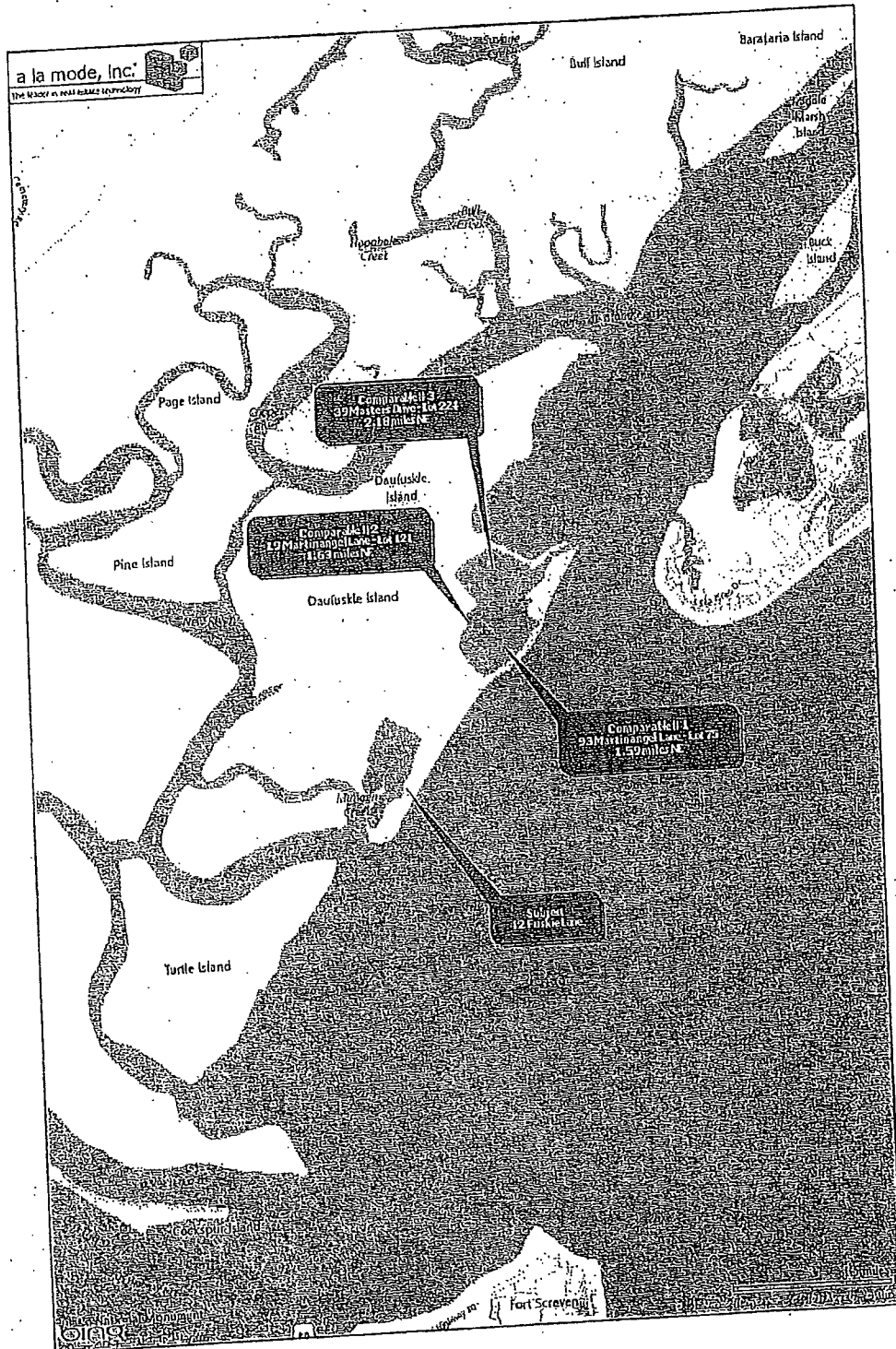
42 Fuskla Lane - Lot 55
 Sales Price N/A
 Gross Living Area
 Total Rooms
 Total Bedrooms
 Total Bathrooms
 Location Good/Bloody Point
 View
 Site .53
 Quality
 Age

Golf View to Rear

Subject Street

Comparable Sales Map

Borrower/Cient	Not applicable			
Property Address	42 Fuskla Lane	County	Beaufort	State SC Zip Code 29916
City	Daufuskie Island			
Lender	David Fingerhut & Patricia Santry			



Assumptions, Limiting Conditions & Scope of Work

File No: L12-001

State: SC

Zip Code: 29916

City: Daufuskie Island

Address: 801 North Elm Street, High Point, NC 27262

Property Address: 42 Fuskle Lane

Client: David Fingerhut & Patricia Santry

Address: P.O. Box 5331, Hilton Head Island, SC 29936

Appraiser: Michael J. Whitton

STATEMENT OF ASSUMPTIONS & LIMITING CONDITIONS

- The appraiser will not be responsible for matters of a legal nature that affect either the property being appraised or the title to it. The appraiser assumes that the title is good and marketable and, therefore, will not render any opinions about the title. The property is appraised on the basis of it being under responsible ownership.
- The appraiser may have provided a plat and/or parcel map in the appraisal report to assist the reader in visualizing the lot size, shape, and/or orientation. The appraiser has not made a survey of the subject property.
- If so indicated, the appraiser has examined the available flood maps that are provided by the Federal Emergency Management Agency (or other data sources) and has noted in the appraisal report whether the subject site is located in an identified Special Flood Hazard Area. Because the appraiser is not a surveyor, he or she makes no guarantees, express or implied, regarding this determination.
- The appraiser will not give testimony or appear in court because he or she made an appraisal of the property in question, unless specific arrangements to do so have been made beforehand.
- The appraiser has noted in the appraisal report any adverse conditions (including, but not limited to, the presence of hazardous wastes, toxic substances, etc.) observed during the inspection of the subject property, or that he or she became aware of during the normal research involved in performing the appraisal. Unless otherwise stated in the appraisal report, the appraiser has no knowledge of any hidden or unapparent conditions of the property, or adverse environmental conditions (including, but not limited to, the presence of hazardous wastes, toxic substances, etc.) that would make the property more or less valuable, and has assumed that there are no such conditions and makes no guarantees or warranties, express or implied, regarding the condition of the property. The appraiser will not be responsible for any such conditions that do exist or for any engineering or testing that might be required to discover whether such conditions exist. Because the appraiser is not an expert in the field of environmental hazards, the appraisal report must not be considered as an environmental assessment of the property.
- The appraiser obtained the information, estimates, and opinions that were expressed in the appraisal report from sources that he or she considers to be reliable and believes them to be true and correct. The appraiser does not assume responsibility for the accuracy of such items that were furnished by other parties.
- The appraiser will not disclose the contents of the appraisal report except as provided for in the Uniform Standards of Professional Appraisal Practice, and any applicable federal, state or local laws.
- An appraiser's client is the party (or parties) who engage an appraiser in a specific assignment. Any other party acquiring this report from the client does not become a party to the appraiser-client relationship. Any persons receiving this appraisal report because of disclosure requirements applicable to the appraiser's client do not become intended users of this report unless specifically identified by the client at the time of the assignment.
- The appraiser's written consent and approval must be obtained before this appraisal report can be conveyed by anyone to the public, through advertising, public relations, news, sales, or by means of any other media, or by its inclusion in a private or public database. Possession of this report or any copy thereof does not carry with it the right of publication.
- Forecasts of effective demand for the highest and best use or the best fitting and most appropriate use were based on the best available data concerning the market and are subject to conditions of economic uncertainty about the future.

The Scope of Work is the type and extent of research and analyses performed in an appraisal assignment that is required to produce credible assignment results, given the nature of the appraisal problem, the specific requirements of the intended user(s) and the intended use of the appraisal report. Reliance upon this report, regardless of how acquired, by any party or for any use, other than those specified in this report by the Appraiser, is prohibited. The Opinion of Value that is the conclusion of this report is credible only within the context of the Scope of Work, Effective Date, the Date of Report, the Intended User(s), the Intended Use, the stated Assumptions and Limiting Conditions, any Hypothetical Conditions and/or Extraordinary Assumptions, and the Type of Value, as defined herein. The appraiser, appraisal firm, and related parties assume no obligation, liability, or accountability, and will not be responsible for any unauthorized use of this report or its conclusions.

Additional Comments (Scope of Work, Extraordinary Assumptions, Hypothetical Conditions, etc.):

Certifications & Definitions

File No.: L12-001
 City: Dariuskie Island
 State: SC Zip Code: 29915
 Property Address: 42 Fuskle Lane
 Address: 801 North Elm Street, High Point, NC 27262
 Client: David Fingerhut & Patricia Santry
 Address: P.O. Box 6331, Hilton Head Island, SC 29938
 Appraiser: Michael J. Whilton

APPRAISER'S CERTIFICATION

I certify that, to the best of my knowledge and belief:

- The statements of fact contained in this report are true and correct.
- The credibility of this report, for the stated use by the stated user(s), of the reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions, and are my personal, impartial, and unbiased professional analyses, opinions, and conclusions.
- I have no present or prospective interest in the property that is the subject of this report and no personal interest with respect to the parties involved.

— I have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment.

— My engagement in this assignment was not contingent upon developing or reporting predetermined results.

— My compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.

— My analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the Uniform Standards of Professional Appraisal Practice that were in effect at the time this report was prepared.

— I did not base, either partially or completely, my analysis and/or the opinion of value in the appraisal report on the race, color, religion, sex, handicap, familial status, or national origin of either the prospective owners or occupants of the subject property, or of the present owners or occupants of the properties in the vicinity of the subject property.

— Unless otherwise indicated, I have made a personal inspection of the property that is the subject of this report.

— Unless otherwise indicated, no one provided significant real property appraisal assistance to the person(s) signing this certification.

Additional Certifications:

DEFINITION OF MARKET VALUE *

Market value means the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

1. Buyer and seller are typically motivated;
2. Both parties are well informed or well advised and acting in what they consider their own best interests;
3. A reasonable time is allowed for exposure in the open market;
4. Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and
5. The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

* This definition is from regulations published by federal regulatory agencies pursuant to Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) of 1989 between July 5, 1990, and August 24, 1990, by the Federal Reserve System (FRS), National Credit Union Administration (NCUA), Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS), and the Office of Comptroller of the Currency (OCC). This definition is also referenced in regulations jointly published by the OCC, OTS, FRS, and FDIC on June 7, 1994, and in the Interagency Appraisal and Evaluation Guidelines, dated October 27, 1994.

Client Name: David Fingerhut & Patricia Santry	
Address: 801 North Elm Street, High Point, NC 27262	
Client Contact:	Address: 801 North Elm Street, High Point, NC 27262
E-Mail: psd@roadrunner.com	
APPRAISER	
Supervisory Appraiser (if required) or CO-APPRAISER (if applicable)	
Supervisory or Co-Appraiser Name:	
Company:	
Phone:	
E-Mail:	
Date Report Signed:	
License or Certification #:	
Designation:	
Expiration Date of License or Certification:	
Inspection of Subject: ☐ Did Inspect ☐ Did Not Inspect (Desktop)	
Date of Inspection: January 19, 2012	
Appraiser Name: Michael J. Whilton	
Company: Michael J. Whilton & Assoc.	
Phone: (843) 341-5515 Fax: (843) 341-5536	
E-Mail: mwhilton@harcray.com	
Date Report Signed: January 25, 2012 State: SC	
License or Certification #: L 832	
Designation:	
Expiration Date of License or Certification: 6/30/2012	
Inspection of Subject: ☒ Did Inspect ☐ Did Not Inspect (Desktop)	
Date of Inspection: January 19, 2012	

GPLAND

Copyright © 2007 by a la mode, Inc. This form may be reproduced without written permission, however, a la mode, Inc. must be acknowledged and credited.
 Form GPLN040 — "Vintotal" appraisal software by a la mode, Inc. — 1-800-ALAMODE 3/2007

From: Patricia Santry and David Fingerhut [psdf@roadrunner.com]
Sent: Monday, April 09, 2012 5:27 PM
To: David L. Fingerhut
Subject: FW: 42 Fuskie Lane
Attachments: 42 Fuskie Lane.pdf

From: Jane Minnicks [mailto:JMinnicks@fingerlaw.com]
Sent: Thursday, January 26, 2012 1:47 PM
To: Patricia Santry and David Fingerhut
Cc: Julie Serafino
Subject: FW: 42 Fuskie Lane

Good afternoon, Please be advised that there is no additional premium charge due to issue you a title policy for the appraised value of \$17,000.00. \$100.00 is the minimum premium charged by First American and it begins at \$17,000.00 which is what we collected. So we will order the title update and issue the Title policy for \$17,000.00 and forward to you along with the recorded Deed from the MIE once returned from the ROD Office. It generally takes 60-90 days.

Thanks, jane

From: Julie Serafino
Sent: Thursday, January 26, 2012 1:18 PM
To: Jane Minnicks; Janice Stevens
Subject: FW: 42 Fuskie Lane

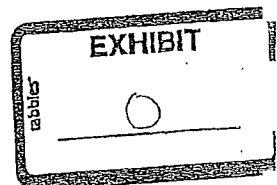
Please provide David and Patty with the requested revised insurance premium based on the appraisal.

Julie A. Serafino, Esquire
Finger & Fraser, P.A.
35 Hospital Center Common, Suite 200
Post Office Box 24005
Hilton Head Island, South Carolina 29925-4005
(843) 681-7000
(843) 681-8802 (facsimile)

The information contained in this electronic mail message is information protected by attorney-client and/or attorney/work product privilege. It is intended only for the use of the individual named above and the privileges are not waived by virtue of this having been sent by electronic mail. If the person actually receiving this electronic mail or any other reader of the electronic mail is not the named recipient or the employee or agent responsible to deliver it to the named recipient, any use, dissemination, distribution, or copying of the communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via U.S. Postal Service.

From: Patricia Santry and David Fingerhut [mailto:psdf@roadrunner.com]
Sent: Thursday, January 26, 2012 12:31 PM
To: Julie Serafino
Subject: 42 Fuskie Lane

Julie:



Attached is our appraisal. Frankly, we're a bit dissatisfied with the valuation, but the appraiser said the problem is that the only current sales are generated by banks at the moment so prices are very low. Oddly enough the appraisal fails to mention proximity to the ocean as a recreational amenity, but what do I know. Anyway, please get us a revised quote on title insurance based upon this appraisal and let me know the additional premium. Given recent events, I would appreciate getting this policy issued as soon as possible. Thanks again.

David

_____ Information from ESET NOD32 Antivirus, version of virus signature database 6829 (20120126)

_____ The message was checked by ESET NOD32 Antivirus.

<http://www.eset.com>

_____ Information from ESET NOD32 Antivirus, version of virus signature database 6830 (20120126)

_____ The message was checked by ESET NOD32 Antivirus.

<http://www.eset.com>

_____ Information from ESET Smart Security, version of virus signature database 7040 (20120409)

_____ The message was checked by ESET Smart Security.

<http://www.eset.com>

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

BLOODY POINT PROPERTY
OWNERS' ASSOCIATION, INC.,

Plaintiff,

vs.

WILLIAM A. ASHTON, JR. and
MICHELE C. ASHTON,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-87-2176

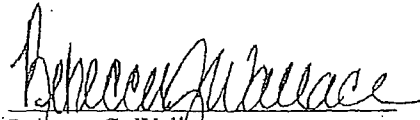
CERTIFICATE OF MAILING

SEP 28 PM 12:11
CLERK OF COURT
JOHNS BEAU
COUNTY, S.C.

This is to certify that I, Rebecca G. Wallace, paralegal with Finger & Fraser, P.A., did on the below date, mailed true and accurate copies of the *Motion and Order Information Form and Cover Sheet, Motion and Order of Default and Reference and Affidavit of Non-Military Service*, to the Defendants, via U.S. Mail, postage prepaid, return address clearly indicated thereon, addressed as follows:

William A. Ashton, Jr.
120 Marlbrooke Way
Kennett Square, PA 19348

Michele C. Ashton
120 Marlbrooke Way
Kennett Square, PA 19348


Rebecca G. Wallace

September 12, 2011

Hilton Head Island, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Bloody Point Property Owners' Association, Inc.,
Plaintiff,

vs.

William A. Ashton, Jr. and Michele C. Ashton,
Defendants.

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2011-CP-07-2176

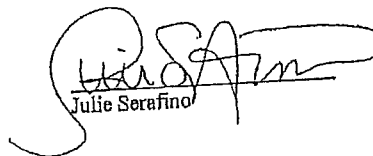
) AFFIDAVIT OF JULIE SERAFINO

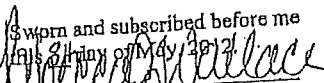
PERSONALLY APPEARED before me, Julie Serafino, who, being duly sworn, alleges and says
as follows:

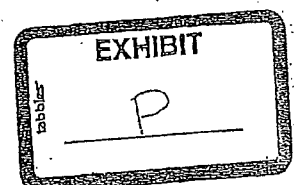
1. I am over 18 years of age, am competent to provide my testimony and affirm that the representations made below are based on my own personal knowledge.
2. I served as the attorney for the Plaintiff in the above-captioned matter.
3. During the course of this litigation, and in preparation for preparing this affidavit, I reviewed the Order of Publication issued by Jerri Ann Roseneau, Clerk of Court for Beaufort County, South Carolina, on July 18, 2011 and filed on July 20, 2011.
4. In accordance with the Order for Publication, I mailed the Summons and Complaint to the Defendants by United States mail, postage prepaid, addressed to the following address:

120 Marlbrooke Way
Kennett Square, PA 19348

FURTHER AFFIANT SAYETH NOT.


Julie Serafino

Sworn and subscribed before me
this 21st day of May 2012

Notary Public for South Carolina
My Commission Expires: 1-13-21



STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

BLOODY POINT PROPERTY
OWNERS' ASSOCIATION, INC.,

Plaintiff,

vs.

WILLIAM A. ASHTON, JR. and
MICHELE C. ASHTON,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-07-2176

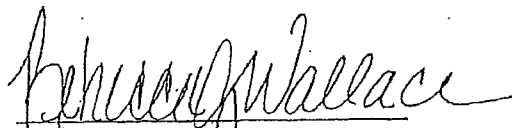
CERTIFICATE OF MAILING

2011 NOV 16 PM 1:39
CLERK OF COURT
SOUTH CAROLINA

This is to certify that I, Rebecca G. Wallace, paralegal with Flinger & Fraser, P.A., did on the below date, mailed a true and accurate copy of the *Notice of Hearing* to the Defendants, via U.S. Mail, postage prepaid, return address clearly indicated thereon, addressed as follows:

William A. Ashton, Jr.
120 Marlbrooke Way
Kennett Square, PA 19348

Michele C. Ashton
120 Marlbrooke Way
Kennett Square, PA 19348


Rebecca G. Wallace

November 15, 2011

Hilton Head Island, South Carolina

F:\Clien\B\BloodyPoint\Collections\Ashton\Pleadings\Certificate of Mailing 2.doc

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

BLOODY POINT PROPERTY
OWNERS' ASSOCIATION, INC.,)

Plaintiff,)

vs.)

WILLIAM A. ASHTON, JR. and
MICHELE C. ASHTON,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-07-216

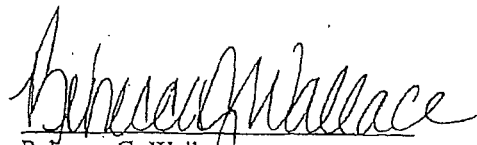
CERTIFICATE OF MAILING

DEC -8 PM 3:10
JEROME ROSEHEAU
CLERK OF COURT
BEAUFORT COUNTY, S.C.

This is to certify that I, Rebecca G. Wallace, paralegal with Finger & Fraser, P.A., did on the below date, mailed a true and accurate copy of the *Form 4, Master's Report and Judgment of Foreclosure and Sale, Affidavit in Support of Attorney's Fees and Costs, Transcript of Testimony and Notice of Foreclosure Sale* to the Defendants, via U.S. Mail, postage prepaid, return address clearly indicated thereon, addressed as follows:

William A. Ashton, Jr.
120 Marlbrooke Way
Kennett Square, PA 19348

Michele C. Ashton
120 Marlbrooke Way
Kennett Square, PA 19348


Rebecca G. Wallace

December 7, 2011

Hilton Head Island, South Carolina

F:\Client\B\BloodyPoint\Collections\Ashton\Pleadings\Certificate of Mailing 3.doc

2012 JAN -6 AM 3:42

BEAUFORT COUNTY, S.C.
CLERK OF COURT
AFFIDAVIT

[illegible]

Sara Johnson Barton,
Publisher and President
The Island Packet/The Beaufort Gazette

Steven K. Meen

My Commission Expires on July 13, 2020



OCT 11 2012

October 9, 2012

MATTHEW E. TILLMAN
ATTORNEY AT LAW
E-Mail: mtillman@wcsr.com
Direct Dial: (843) 720-4636
Fax: (843) 723-7398

Hon. Marvin H. Dukes
P.O. Drawer 1228
Beaufort, SC 29901

Re: *William A. Ashton, Jr. and Michele C. Ashton v. David L. Fingerhut and
Patricia M. Santry*
First American Claim No. SC-1029406795
Property: Lot No. 55, Daufuskie Island, Beaufort County, SC
WCSR File No.: 85249.0026.3

Dear Judge Dukes:

I represent Defendants David Fingerhut and Patricia Santry ("Bidder Plaintiffs") and am in receipt of the September 28, 2012 letter from James F. Berl to Your Honor concerning the motion for reconsideration in this matter. I have attached the letter for your reference.

As an initial matter, the Court has already ordered that the Bidder Plaintiffs paid \$11,593.20 for the property, an amount which included overdue regime fees and property taxes. See 7/24/12 Order at p. 3-4. This finding was not challenged in the Defendants' Motion for Reconsideration and is the law of the case. Therefore, Mr. Berl's statement that Bidder Plaintiffs paid \$8,800 for the property is factually incorrect.

This Court also held that for the sale price to be so inadequate as to shock the conscience of the Court, it would need to be less than 10% of the actual value of the property. See 7/24/12 Order at p. 4. The Court further held that the threshold price is \$115,932.00. *Id.* This holding was also not challenged by the Defendants and is therefore also the law of the case.

In Mr. Berl's letter, the Defendants ask this Court to consider new, additional evidence supporting a higher actual value for the subject property. Specifically, the Defendants reference the sale of 70 Fuskie Lane, Lot 45 Bloody Point ("70 Fuskie Lane") for \$126,650.00. 70 Fuskie Lane did sell for that price on September 4, 2012. See Deed, attached as Exhibit 1.

The Defendants ask this Court to simply use the current sales price of 70 Fuskie Lane as the actual value of the subject property on January 3, 2012. This is a strained argument, at best. First, the 70 Fuskie Lane sale occurred over nine months after the January 3, 2012 foreclosure sale. The Defendants' own appraisal, dated April 2, 2012, uses 70 Fuskie Lane as a comparable lot and valued it at \$107,000. See Exhibit 2, Ashton Appraisal at p. 3. This Ashton valuation occurred only three months after the foreclosure sale. Further, the Lot at 70 Fuskie Lane is .63 acres, while the subject parcel is .53 acres, approximately 16% smaller. Id. at pp. 2, 3. Reducing the 70 Fuskie Lane sales price to account only for that difference¹ yields a value of \$106,386.00 ($\$126,650.00 \times 0.84$). Neither the value assigned by the Ashtons' appraiser nor the actual sales price of 70 Fuskie Lane when adjusted for size is above the \$115,932.00 threshold established by this Court.

Further, there have been at least two other comparable sales of interior or marsh view lots on Daufuskie Island this year. The first is 47 River Road, Lot 98 Bloody Point, which sold on April 30, 2012 for \$75,000. See Exhibit 3, 47 River Road deed. The second is 16 Fuskie Lane, which was sold at a competitive bid tax auction for \$23,000 on October 1, 2012. See Exhibit 4, Tax Sale Receipt.

Therefore, neither the 70 Fuskie Lane sale propounded by the Defendants nor any of the other recent sales of interior lots on Daufuskie Island support the conclusion that the actual value of the subject property was over the \$115,932.00 threshold on the date of the foreclosure sale. The Court's initial ruling was correct and remains so despite the passage of over nine months since the foreclosure sale.

For the reasons set forth herein and in our opposition to the instant motion, the Bidder Plaintiffs request that the Defendants' Motion to Reconsider should be denied.

Yours very truly,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP



Matthew E. Tillman

MET/nmb

cc: Mr. Terry Finger, Esq.
James. F. Berl, Esq.

¹ Without regard to the improving conditions at Bloody Point that occurred after the January 3, 2012 auction, as referenced in the Ashton appraisal at p. 5.

BEAUFORT COUNTY 'SC - ROD
BK 03175 PGS 0727-0729
FILE NUM 2012054046
09/17/2012 04:58:08 PM
REC'D BY R WEBB RCPT# 688683
RECORDING FEES 10.00
County Tax 139.70
State Tax 330.20

RECORDED
2012 Sep -28 02:54 PM
Sharon D. Burns
BEAUFORT COUNTY AUDITOR

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

DEED

KNOW ALL MEN BY THESE PRESENTS, THAT I, **GEORGE VICTOR SMITH, TRUSTEE OF THE GEORGE VICTOR SMITH TRUST DATED NOVEMBER 22, 2004** (hereinafter the "Grantor") in the State aforesaid, for and in consideration of the sum of ONE HUNDRED TWENTY SIX THOUSAND SIX HUNDRED FIFTY AND 00/100 DOLLARS (\$126,650.00) and no other consideration to me in hand paid at and before the sealing of these presents by **KIMBERLY ANN MASTRANGELO** (hereinafter the "Grantee"), whose address is: 208 Stonehill Drive, Rocky Hill, Connecticut 06067, in the State aforesaid, the receipt whereof is hereby acknowledged, has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release unto the said Grantee, her heirs and assigns forever, to-wit:

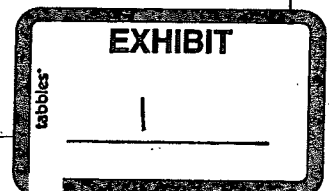
ALL that certain piece, parcel or tract of land situate, lying and being on Daufuskie Island, Beaufort County, South Carolina, designated as LOT NUMBER FORTY-FIVE (45), PHASE I, THE DAUFUSKIE ISLAND CLUB, and being more particularly shown and described on "A Plat of Daufuskie Island Club, Phase 1 Lots," prepared by Thomas & Hutton Engineering Company, Inc., dated April 26, 1989, and revised October 2, 1989 and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Plat Book 37 at Page 12 and revised in Plat Book 50 at Page 101 and Plat Book 50 at Page 139. For a more detailed description as to the courses, metes and bounds of the above mentioned lot, reference is made to said recorded plat.

Tax Map Reference No.:R800-027-00A-0045-0000

Grantor does further assign, transfer and set over unto Grantee, his heirs and assigns forever, a non-exclusive right of access to Lot 45 as shown on the above-referenced plat of record, subject to the provisions of the Declaration of Covenants, Conditions and Restrictions for the Daufuskie Island Club Homesites as recorded in the Office of the Register of Deeds for Beaufort County, South Carolina in Deed Book 539 at Page 1350.

ADD DMP Record 9/20/2012 09:51:15 AM
BEAUFORT COUNTY TAX MAP REFERENCE

Dist	Map	SMap	Parcel	Block	Week
R800	027	00A	0045	0000	00



Reference is made to the plat referenced above for disclosures as required by the South Carolina Coastal Zone Act.

The above-described property is conveyed subject to all applicable affirmative obligations, restrictive covenants, and easements of record in the Office of the Register of Deeds for Beaufort County, South Carolina.

Being the same property conveyed to the within Grantor by Deed of Theodore F. Gonter and Claudette M. Gonter, dated March 26, 2005, and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, on April 7, 2005, in Record Book 2127 at Page 84.

This Deed was prepared in the Law Offices of John P. Qualey, Jr., P.A., Post Office Box 10, Hilton Head Island, South Carolina 29938, by John P. Qualey, Jr., Esquire.

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said Grantee, her heirs and assigns forever.

AND I do hereby bind myself and my successors in trust and assigns to warrant and forever defend, all and singular, the said Premises unto the said Grantee, her heirs and assigns, against me and my successors in trust, and all persons whomsoever lawfully claiming or to claim the same, or any part thereof.

IN WITNESS WHEREOF, I have caused this Deed to be executed and sealed this 4th
day of September, 2012.

WITNESSES:

[Signature]
Witness #1

[Signature]
Notary Public as Witness #2

[Signature] (Seal)
GEORGE VICTOR SMITH, TRUSTEE
OF THE GEORGE VICTOR SMITH
TRUST DATED NOVEMBER 22, 2004

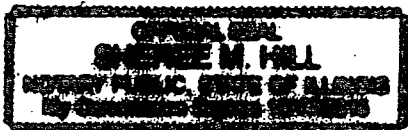
STATE OF ILLINOIS)

COUNTY OF COOK)

ACKNOWLEDGMENT

I HEREBY CERTIFY that on this 4 day of September, 2012, before me, the undersigned Notary Public of the State and County aforesaid, personally appeared GEORGE VICTOR SMITH, TRUSTEE OF THE GEORGE VICTOR SMITH TRUST, DATED NOVEMBER 22, 2004, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within Deed, who acknowledged the due execution thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year last above mentioned.



[Signature]
Notary Public for Illinois
My Commission Expires: 10-17-15

SUMMARY APPRAISAL REPORT OF
THE PROPERTY LOCATED AT

42 Puskie Lane

Daufuskie Island, SC 29915

as of

April 2, 2012

for

Client: William A Ashton Jr MD & Michele C Ashton
120 Marlbrooke Way
Kennett Square, PA
19348

by

Accent Appraisals, Inc.

PO Box 5185
Hilton Head Island, SC 29938

EXHIBIT

2

Complete Appraisal Analysis - Summary Appraisal Report

LAND APPRAISAL REPORT

File No. 1513212.ACC

Borrower <u>N/A</u> Property Address <u>42 Fuskie Lane</u> City <u>Daufuskie Island</u> County <u>Beaufort</u> State <u>SC</u> Zip Code <u>29915</u> Legal Description <u>Lot 55 Daufuskie Island Club PH I PB 37 P12</u> Sale Price <u>\$N/A</u> Date of Sale <u>N/A</u> Loan Term <u>N/A</u> yrs. Property Rights Appraised ☒ Fee ☐ Leasehold ☐ De Minimis PUD Actual Real Estate Taxes <u>\$1670/2011</u> (or) Loan charges to be paid by seller <u>\$N/A</u> Other sales concessions <u>N/A</u> Lender/Clerk <u>Client: William A Ashton Jr MD & Michele C Ashton</u> Address <u>120 Marlbrooke Way, Kennett Square, PA, 19348</u> Occupant <u>Unimproved Site</u> Appraiser <u>Berendina E. Page</u> Instructions to Appraiser <u>Estimate Market Value</u>																																																																																						
Location ☐ Urban ☒ Suburban ☐ Rural Built Up ☐ Over 75% ☒ 25% to 75% ☐ Under 25% Growth Rate ☐ Fully Dev. ☐ Rapid ☒ Steady ☐ Slow Property Values ☐ Increasing ☒ Stable ☐ Declining Demand/Supply ☐ Shortage ☒ In Balance ☐ Over Supply Marketing Time ☐ Under 3 Mos. ☒ 4-6 Mos. ☐ Over 6 Mos. Present Land Use <u>40</u> % 1 Family <u>58</u> % 2-4 Fam <u>1</u> % Apts. <u>1</u> % Condo <u>1</u> % Commercial Change in Present Land Use ☐ Not Likely ☒ Likely (?) ☐ Taking Place (?) (7) From <u>Undeveloped</u> To <u>Res & Commercial</u> Predominant Occupancy ☒ Owner ☐ Tenant ☐ % Vacant Single Family Price Range <u>\$40</u> to <u>\$2+ Mill.</u> Predominant Value \$ <u>400,000</u> Single Family Age <u>New</u> yrs. to <u>80</u> yrs. Predominant Age <u>20-24</u> yrs.																																																																																						
Comments including those factors, favorable or unfavorable, affecting marketability (eg. public parks, schools, noise) <u>Daufuskie Island is developed as an upscale, secluded, exclusive golf and country club retreat featuring 2 private & gated residential subdivisions - Ilaig Point and Melrose Plantation. Additional subdivisions are Bloody Point, Oakridge. Development on Daufuskie Island began in 1985+. *** See Additional Comments ***</u>																																																																																						
Dimensions <u>Per Attached Plat</u> <u>23,104 Sft/0.53 Ac</u> ☐ Corner Lot Zoning Classification <u>PUD - Planned Development</u> Present Improvements ☒ do ☐ do not conform to zoning regulations Highest and best use: ☐ Present use ☒ Other (specify) <u>Improve with a Single Family Residence</u> Public ☒ Other (Describe) <u>LPTnk/Typical</u> Elevation ☒ OFF SITE IMPROVEMENTS Gas ☐ Street Access: ☐ Public ☒ Private Water ☒ Surface <u>Asphalt/Concrete</u> San. Sewer ☒ Maintenance: ☐ Public ☒ Private ☐ Storm Sewer ☐ Curb/Gutter ☐ Sidewalk ☐ Street Lights Topo <u>Generally Level</u> Size <u>0.53 Acres</u> Shape <u>Rectangular</u> View <u>Golf & 2nd Row Ocean</u> Drainage <u>Appears Adequate - sloping to road</u> Is the property located in a HUD identified Special Flood Hazard Area? ☐ No ☒ Yes																																																																																						
Comments (favorable or unfavorable including any apparent adverse easements, encroachments or other adverse conditions) <u>There are no adverse easements or encroachments known or made known which negatively affect the subject's value. Typical building setbacks Flood panel 450025 0138D - Zone A7 dated 09/29/86. When improved flood insurance will be required. No adverse effect on value nor marketability.</u>																																																																																						
The undersigned has reviewed three recent sales of properties most similar and proximate to subject and has considered these in the market analysis. The description includes a dollar adjustment, reflecting market reaction to those items of significant variation between the subject and comparable properties. If a significant item in the comparable property is superior to, or more favorable than, the subject property, a minus (-) adjustment is made, thus reducing the indicated value of subject; if a significant item in the comparable is inferior to, or less favorable than, the subject property, a plus (+) adjustment is made, thus increasing the indicated value of the subject.																																																																																						
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Comments on Market Data: <u>SEE ADDED COMPARABLES 4,5,6,7,8 & 9 AND THE ADDITIONAL COMMENTS ADDENDUM.</u>																																																																																						
Comments and Conditions of Appraisal: <u>This appraisal is made on an unimproved residential building site lot 55 Daufuskie Island Club ph I - Bloody Point - Daufuskie Island, SC</u>																																																																																						
Final Reconciliation: <u>The Market Data Approach best supports the final conclusion of value as it represents the actions of buyers and sellers in the market place. See additional comments addendum - Market data.</u>																																																																																						
I ESTIMATE THE MARKET VALUE OF THE SUBJECT PROPERTY AS OF <u>April 2</u> , 2012 to be \$ <u>140,000</u> Appraiser(s) <u>Berendina E. Page</u> Review Appraiser (if applicable) ☐ Did ☐ Did Not Physically Inspect Property Signature <u>Berendina E. Page</u> Date <u>04/15/2012</u> Name _____ Date _____ State <u>SC</u> License ☒ Certification # <u>2571</u> State _____ License ☐ Certification # _____																																																																																						

ADDITIONAL COMPARABLES

Borrower/Client		N/A			
Property Address		42 Fuskie Lane			
City		Daufuskie Island		County	Beaufort
				State	SC
Zip Code		29915			
Lender		Client: William A. Ashton Jr MD & Michele C Ashton			
ITEM	Subject Property	COMPARABLE NO. 4		COMPARABLE NO. 5	
Address	42 Fuskie Lane Lot 55 Bloody Point	70 Fuskie Lane Lot 45 Bloody Point		24 Fuskie Lane Lot 64 Bloody Point	
Proximity to Subj.		0.31 miles SW		0.17 miles NE	
Sales Price	\$ N/A	\$ 149,000		\$ 249,000	
Price	\$ N/A	\$ N/A		\$ N/A	
Data Source	County Records/Insp./MLS	MLS#305492/County Records		MLS#315052/County Records	
Date of Sale and Time Adjustment	DESCRIPTION Insp. 04/02/2012	DESCRIPTION LIST/Avg Nego 28% -42,000		DESCRIPTION LIST/Avg Nego 28% -70,000	
Location	Bloody Point/Daufuskie	Bloody Point/Daufuskie		Bloody Point/Daufuskie	
Site/View	Golf/2nd Row Ocean	Mrsh/Golf/2nd Row Ocean		Golf/2nd Row Ocean	
Site Area	0.53 AC	0.63 AC		0.53 AC	
Sq Ft/Acre	23,104 Sqft	27,443 Sqft		23,086 Sqft	
SS/Sqft	N/A	55.43/Sqft		58.62/Sqft	
Days On Market	N/A	LD 12/06/10/481 Days		LD 04/12/12	
Sales or Financing Concessions	N/A	Prior Sale 03/26/05 @ \$220,000		Prior Sale 09/24/01 @ \$190,000	
Net Adj. (Total)		Plus X Minus \$ -42,000		Plus X Minus \$ -70,000	
Indicated Value of Subject		Gross 28.2% Net -28.2% \$ 107,000		Gross 28.1% Net -28.1% \$ 179,000	
Comments on Market Data Analysis In addition to comps 4, 5, & 6 MLS# 234192 Lot 57 Bloody Point -38 Fuskie Lane Mailing 0.53 Acres site is listed as of 11/13/2006 at \$625,000-. List price for this site has not been adjusted over time to reflect market behavior. It sold prior on 03/25/1999 at \$95,000					
The most recent market sale for the subject property is on 06/06/2001 at \$201,500 and on 12/09/1999 at \$110,000. Comparable 4 sold prior 03/02/05 at \$220,000 and on 10/02/00 at \$142,000. Prior sale comp. 5 is on 09/24/01 @ \$190,000. Prior sale comp 6 is on 12/06/01 @ \$130,000					

ADDITIONAL COMPARABLES

Borrower/Client		N/A	
Property Address		42 Fuskie Lane	
City		Daufuskie Island	
County		Beaufort	
State		SC	
Zip Code		29915	
Lender		Client: William A. Ashton Jr MD & Michele C. Ashton	
ITEM		Sublet Property	
COMPARABLE NO. 7		COMPARABLE NO. 8	
COMPARABLE NO. 9			
Address	42 Fuskie Lane Lot 55 Bloody Point	29 River Rd Lot 89 Bloody Point	86 Fuskie Lane Lot 109 Bloody Point
Proximity to Subj.	0.47 miles NW	0.45 miles SW	0.55 miles SW
Sales Price	\$ N/A	\$ 129,000	\$ 259,900
Price	\$ N/A	\$ N/A	\$ N/A
Data Source	County Recs./Insp./MLS	MLS#314817/County Recs	MLS#314273/County Recs
Date of Sale and Time Adjustment	DESCRIPTION Insp. 04/02/2012	DESCRIPTION LIST/Avg Nego 28% -36,000	DESCRIPTION LIST/Avg Nego 28% -73,000
Location	Bloody Point/Daufuskie	Bloody Point/Daufuskie	Bloody Point/Daufuskie
Site View	Golf/2nd Row Ocean	Golf/Ocean Ornt Inferior	Marsh/2nd Row Ocean
Site Area	0.53 AC	0.52 Act-	0.92 Act- Superior
Sqft/Acre	23,104 Sqft	22,651 Sqft-	40,075 Sqft- Superior
SS/Sqft	N/A	\$5.70/Sqft	\$6.49/Sqft/Listprice \$10.05/Sqft/Listprice
Days On Market	N/A	LD 04/01/12/1 day	LD 04/06/12 LD 06/27/11/245 Days
Sales or Financing Concessions	N/A	Prior Sale 04/26/05 @ \$129,000	Prior Sale 09/15/03 @ \$250,000 07/07/05 @ \$725,000
Net Adj. (Total)		Plus ☒ Minus \$ -36,000	Plus ☒ Minus \$ -73,000 Plus ☒ Minus \$ -140,000
Indicated Value of Subject		Gross 27.9% Net -27.9% \$ 93,000	Gross 28.1% Net -28.1% \$ 186,900 Gross 28.1% Net -28.1% \$ 359,000
Comments on Market Data Analysis: The only prior sale for comp. 7 is on 04/26/05 at \$129,000. Comparable 8 sold prior on 09/15/03 @ \$250,000 and on 09/22/00 at \$295,000, on 06/13/00 it sold at \$170,000 (seller Melrose Co). On 06/05/00 it appears Mr. & Mrs. Milward sold lot 109 to the Melrose Co at \$325,000. Comparable 9 sold prior 07/07/05 @ \$725,000. It is listed at \$492,000 or at 31%+ below purchase price.			
MLS#301758 is an expired listing on 03/23/2012 of lot 85 Bloody Point (21 River Rd) 0.50 Ac site listed at \$85,000, reduced from \$95,000 when it was first listed on 06/07/2010. It sold prior on 12/20/2007 at \$145,000 and on 06/22/05 at \$150,000			
Comparable 9 is added only because of the lack of recent sales. Comp. 9 and expired listing lot 85 appear good indicators of market conditions/value trend.			

ADDITIONAL COMMENTS

Borrower or Owner N/A

Property Address 42 Fuskie Lane

City Daufuskie Island

County Beaufort

State SC

Zip Code 29915

Lender or Client Client: William A. Ashton Jr MD & Michele C. Ashton

Neighborhood

Daufuskie Island is developed as an upscale, secluded, exclusive golf and country club retreat featuring 2 private & gated residential subdivisions - Haig Point and Melrose Plantation known as 'The Daufuskie Island Club & Resort. Development of Daufuskie Island began in 1985. In addition to the 2 gated residential communities, plotted development progressed with Bloody Point, Maryfield, Indian Springs, Governors, Oakridge & Benchfield S/D. Historical Daufuskie, is the home of mostly Daufuskie natives.

Bloody Point is founded in 1991 and covers 350 acres. It features 110 plotted homesites combined along Fuskie Lane and River Road. Approximately 15 sites are improved with a single family residence. 1 Fuskie Lane features Sandy Lane Villas a 32 unit Ocean Front Condominium complex.

Daufuskie Island is a small barrier ferry served island. Recent population numbers are approx 400 permanent residents and the same as part time residents. The few paved roads on the island are mainly within the residential subdivisions. Most roads outside the subdivisions - "plantations", are dirt/sand roads. Transportation on the island is primarily electric/gas golf cart although some automobiles/trucks are on the island. Besides the Haig Point ferry to Hilton Head Island, which services mostly it's members and their guests, ferry services are extremely limited with as little as 2 round trips daily and none on Sunday's (current round trip fee is \$28.00 per person with children under 2 are free).

The limited ferry services is a result of the Bankruptcy of all the assets of the Daufuskie Island resort, & Breathe Spa (a.k.a Melrose) in January 2009.

Assets of the resort include: the Inn, two golf courses (Melrose and Bloody Point), tennis courts, several restaurants, beach club, an equestrian center, entitlements to develop more than 500 commercial and residential parcels.

Mr. Robert C. Onorato became the Appointed Trustee for Daufuskie Island Properties, Inc Chapter 11 Bankruptcy

The Bloody Point S/D sold at auction in 06/2011 to Brian McCarthy. Under new ownership, the golf course is currently under rehabilitation by Love Design Group. (see additional pictures subject property). The Club House Restaurant, "The Eagles Nest" has reopened. "Permits have been issued for the community dock to be built behind the 17th green on the Mungen River, to provide limited ferry service to and from Savannah, Ga. The former "Spa" Building is being renovated into a facility with 7 bedrooms for owners and golfers to stay" data 01/12/2012 Bloody Point Property Owners Newsletter, by Tony Simonelli, President Bloody Point POA.

As a result of the chapter 11 bankruptcy and the economic downturn, property values have steadily declined with the number of available Short Sale and REO properties increasing, whilst demand is trailing supply.
MARKET CONDITIONS DAUFUSKIE ISLAND - BLOODY POINT.

DAUFUSKIE ISLAND:

169 residential building sites are listed in a list price range \$1. - \$1,399,000
\$1.00 site is located in Haig Point. It requires Club Membership valued at \$65,000.
In addition a 194.25 acre undeveloped tract is listed at \$1,900,000.

27 sites sold in the past 12 months ranging \$1.-\$425,000

6 sites are current contracted scheduled to close in a list price range \$17,500-\$399,000.

BLOODY POINT:

Of the 169 residential sites listed, 11 are located in Bloody Point in a list price range \$129,000-\$1,399,000 (see attached map Bloody Point S.D)

Of the 27 sales, 2 Bloody Point sites sold on the past 12 months. -Both are REO Properties (See comparables 1&2)
Lot 31 at \$350,000 - MLS#310904
Lot 35 at \$363,300 - MLS#305666

1 Bloody Point site sold in the previous 12 mo period 04/10-04/11
(MLS#255287 Lot 25 a short Sale at \$699,000 on 07/16/2010.

Sandy Lane Condominiums:

4 Units are currently listed in a list price range \$550,000-\$650,000 (Unit 1403 is a short sale listing at \$650,000- None are REO Property Listings)
2 units sold in the past 12 months both are REO properties selling cash at \$360,000 unit 2204 and \$340,000 unit 1203
Unit 1104 is the only sale in the previous 12 mo period 4/2010-4/2011 an REO Property it sold Cnsh 06/23/2010 @ \$350,000.

34 homes are listed on Daufuskie Island in a listed price range \$99,000-\$1,995,000
16 sold in the past 12 months in price range \$39,900-\$823,000.
5 homes are under contract scheduled to close in a list price range \$229,00-\$229,000
In addition 1 is a contingent- subject to listing, listed at \$599,000

Of the 34 homes listed 1 is located within Bloody Point MLS# 314119 lot 13 - 35 Fuskie Lane at \$1,995,000.
No homes sold in the past 12 month period. None sold in the previous 12 mo period 04/2010-04/2011.
Data is per MLSofHII

NEIGHBORHOOD: FAIR RATING a result of the bankruptcy and current economics. Poor Transportation rating reflects Limited Ferry Services. Recreational facilities at present are fair.

Year 2012 Bloody Point HOA dues are \$1,150 for the year. (per GW services)

ADDITIONAL COMMENTS
Page 2

Borrower or Owner	N/A		
Property Address	42 Fuskie Lane		
City	Daufuskie Island	County	Beaufort
State	SC	Zip Code	29915
Lender or Client	Client: William A Ashton Jr and Michele C Ashton		

Comments on Market Data

Disclosure: I certify, as the appraiser, that I have NOT appraised, or provided a previous service regarding the subject property in the past 36 months prior to this assignment and that I have no current or prospective interest in the subject property or parties involved.

I certify, as the appraiser, that I have complied with the Home Valuation Code of Conduct in all aspects of the appraisal process.

Scope of work: Provide an opinion of market value as of the effective date of this report 04/02/2012.

Intended use is to rebut the 01/06/2012 sale and sales price of the subject property at \$8,800 recorded book 3111/page 1291.

Intended user(s): Dr. & Mrs. William Ashton Jr. and their legal representatives.

NO other use and users are identified, nor intended by the appraiser.

The subject property is located in Bloody Point S/D on Daufuskie Island, SC. It is an unimproved residential building site known as lot 55 Daufuskie Island Club Phase 1. Property ID R800 027 00A 0055 0000, Key # 01824887

Due to the lack of recent sales comparable to subject property and located within Bloody Point S/D, 9 Comparables are utilized in this report. Comps. 1, 2 and 3 are closed sales comparables. Although all 3 closed sales comparables have a superior valued ocean front location, they are considered good indicators of the Bloody Point - Melrose market conditions.

Comp. 1 & 2 are REO property sales located in Bloody Point. Sale 2 is a short sale property sale located in Melrose S/D.

Because none of the 3 sales are arms length transactions, No adjustment is established to the comparables pertaining to the superior valued site/view @\$sqft. Instead listing comparables 4, 5, 6, 7, 8 & 9 are added. All listing comparables are adjusted for negotiation at 28% based on the list to sale price comparables for 4, 5 and 6.

Comps 4, 5 & 6 are considered the best indicators of value for the subject property, with added consideration of comparables 7, 8 resp. Comp. 9 is given least consideration.

The best indication of value for the subject property is provided from within Bloody Point S/D. With Melrose Plantation also selling a bankruptcy sale in 2011 it's market conditions are most similar to Bloody Point. Sales/listings from within Halp Point-a gated golfing community are not considered comparable. They include mandatory club membership valued at \$65,000+-. Other developing Daufuskie S.D. & Historical Daufuskie are no golfing communities and are not comparable.

With the limited available sales data, the comparables utilized here are the best indicators of value for the subject property at this time.



State of South Carolina
Department of Labor, Licensing and Regulation
Real Estate Appraisers Board

BERENDINA E. PAGE

Is hereby entitled to practice as a:

Certified Residential Appraiser

License Number: 2571

Expiration Date: 06/30/11

OFFICE COPY

State of South Carolina
Department of Labor, Licensing and Regulation
Real Estate Appraisers Board

BERENDINA E. PAGE

Is hereby entitled to practice as a:

Certified Residential Appraiser

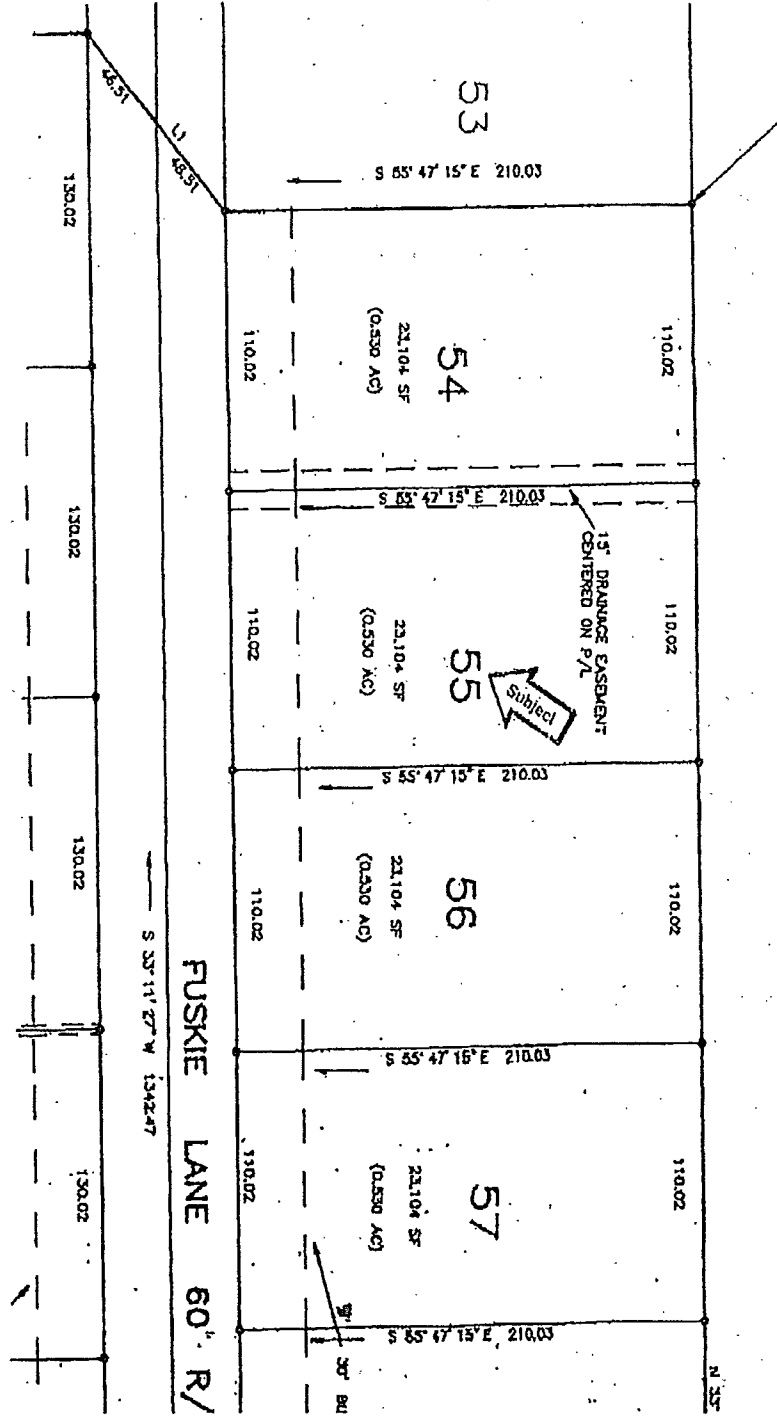
License Number: 2571

Expiration Date: 06/30/11

POCKET CARD

SITE PLAN

Borrower or Owner	N/A		
Property Address	42 Fuskie Lane		
City	Daufuskie Island	County	Beaufort
State	SC	Zip Code	29915
Client	Client: William A Ashton Jr MD & Michele C Ashton		



PHOTOGRAPH ADDENDUM

Borrower or Owner **N/A**
 Property Address **42 Fiskie Lane**
 City **Danfuskie Island** County **Beaufort** State **SC** Zip Code **29915**
 Client **Client: William A. Ashton Jr MD & Michele C. Ashton**



**FRONT VIEW OF
SUBJECT PROPERTY**



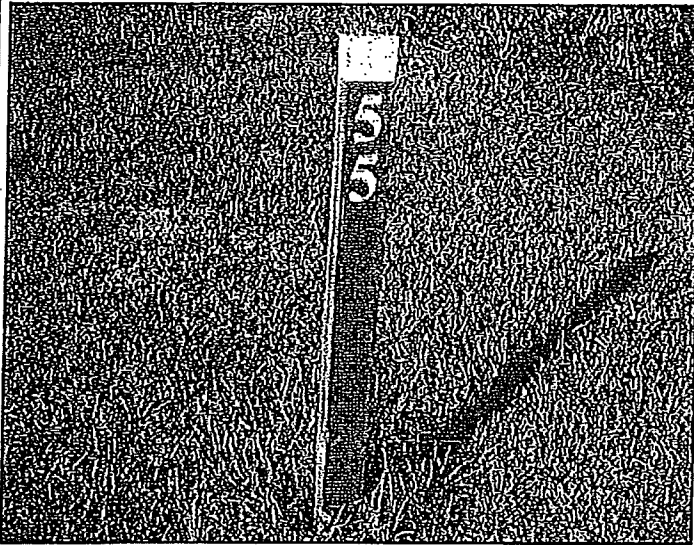
**REAR VIEW OF
SUBJECT PROPERTY**



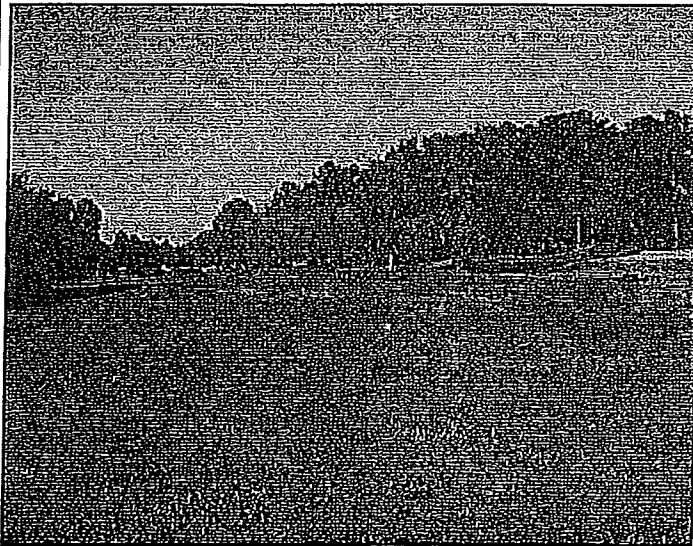
**STREET SCENE OF
SUBJECT PROPERTY**

PHOTOGRAPH ADDENDUM

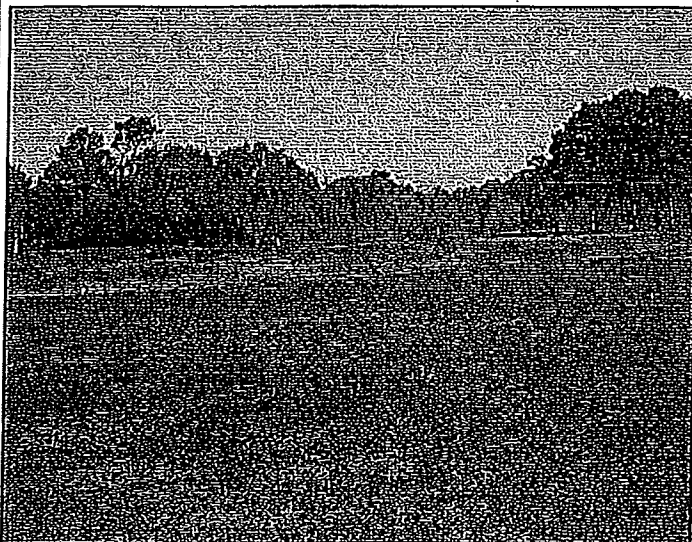
Borrower or Owner N/A
 Property Address 42 Fuskie Lane
 City Daufuskie Island County Beaufort State SC Zip Code 29915
 Client Client: William A. Ashton Jr MD & Michele C Ashton



42 Fuskie Lane
 SITE MARKER



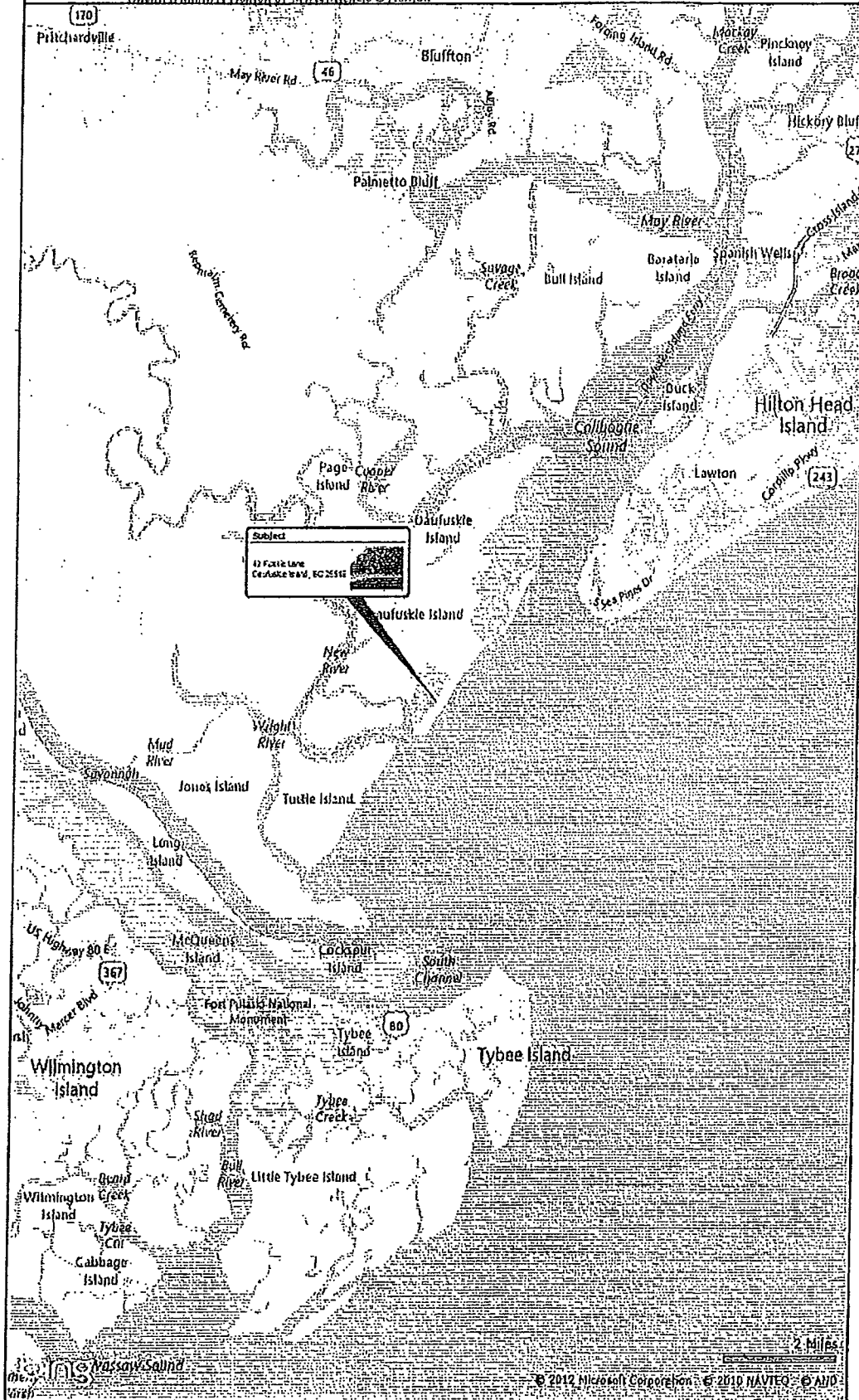
42 Fuskie Lane
 GOLF COURSE PICT 1



42 Fuskie Lane
 GOLF COURSE PICT 2

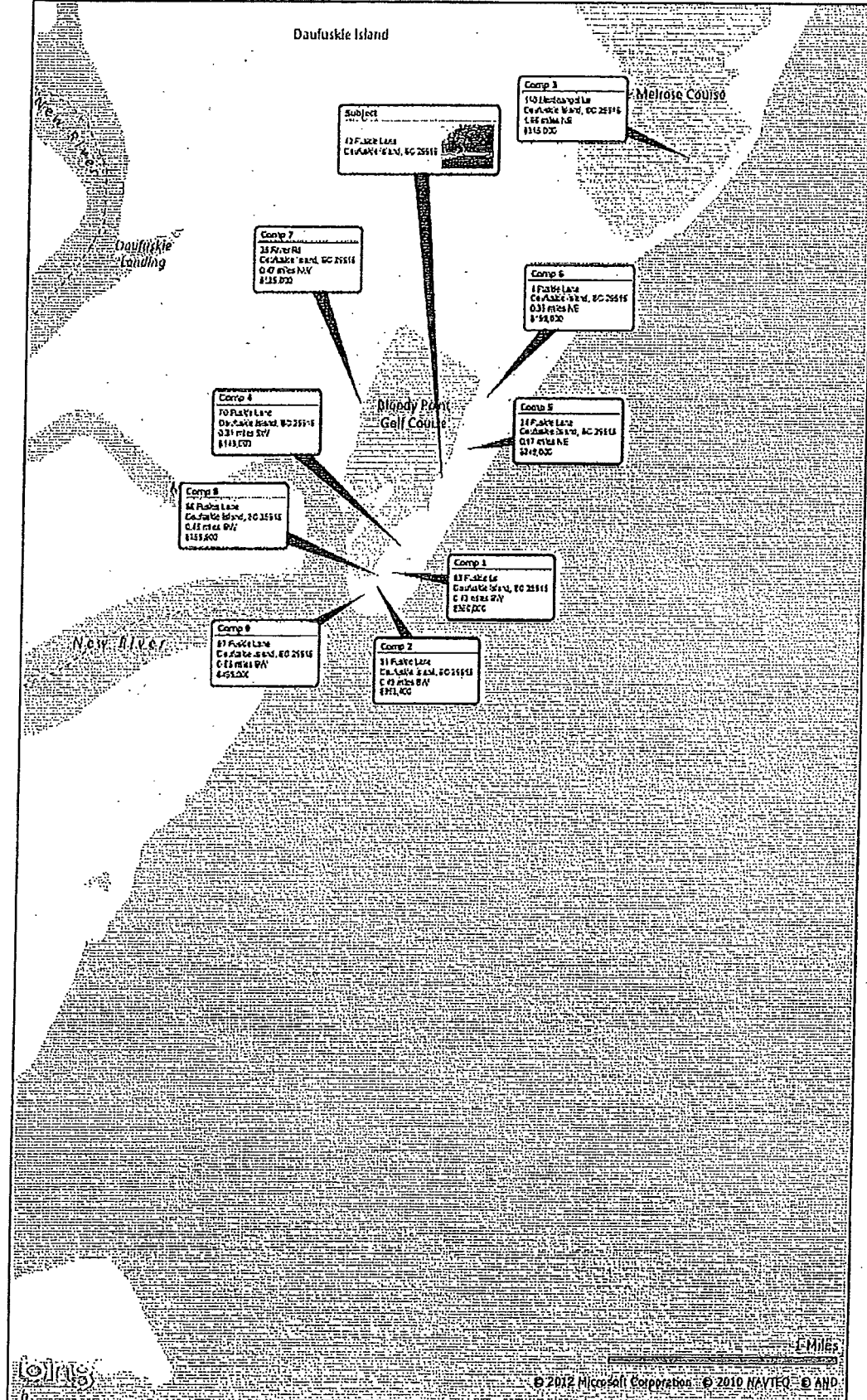
LOCATION MAP

Borrower or Owner	N/A		
Property Address	42 Fuskle Lane		
City	Daufuskie Island	County	Beaufort
State	SC	Zip Code	29915
Client	Client: William A Ashton Jr MD & Michele C Ashton		



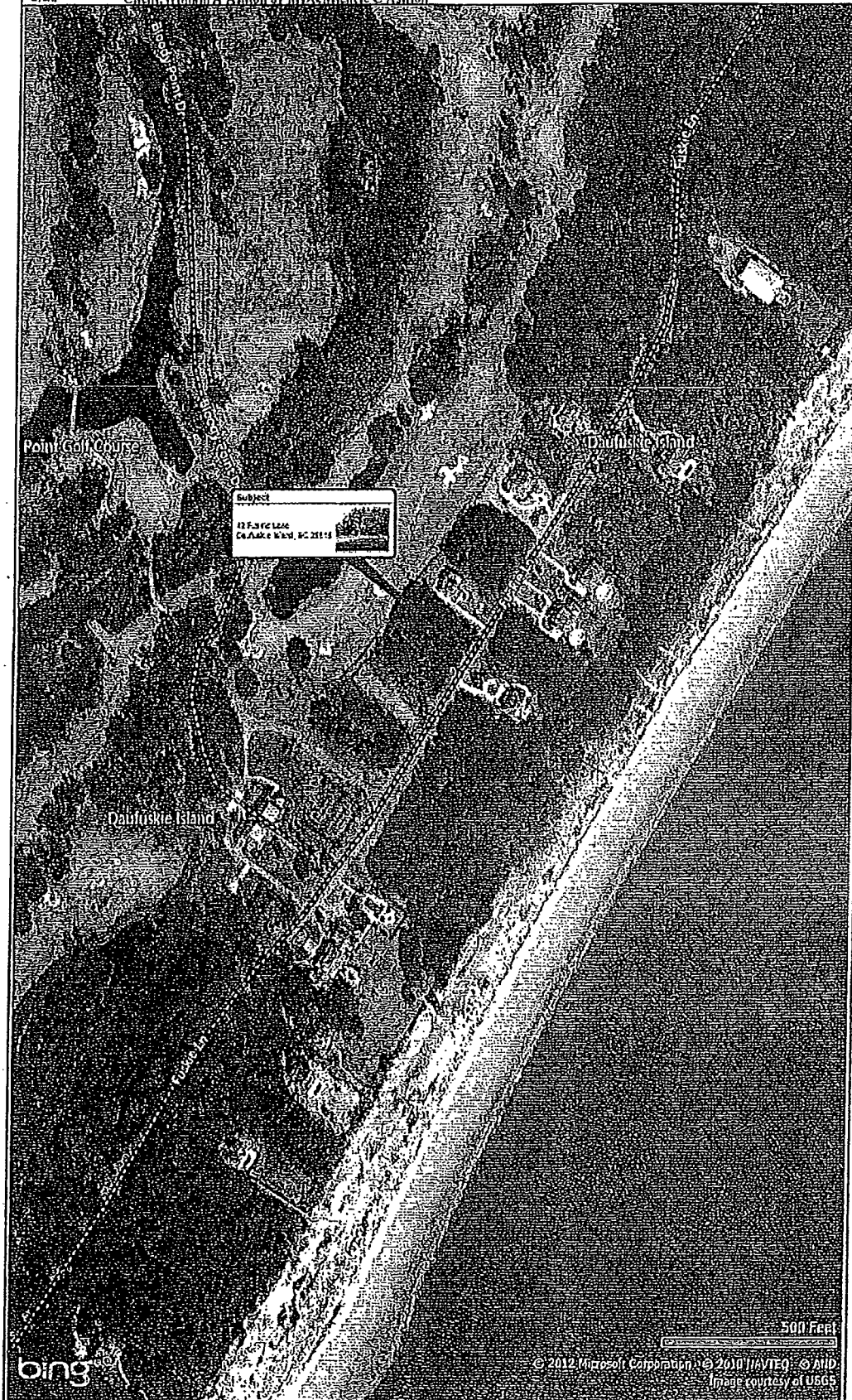
General Map 1

Borrower or Owner N/A
 Property Address 42 Fushie Lane
 City Daufuskie Island County Beaufort State SC Zip Code 29915
 Client William A Ashton Jr MD & Michele C Ashton

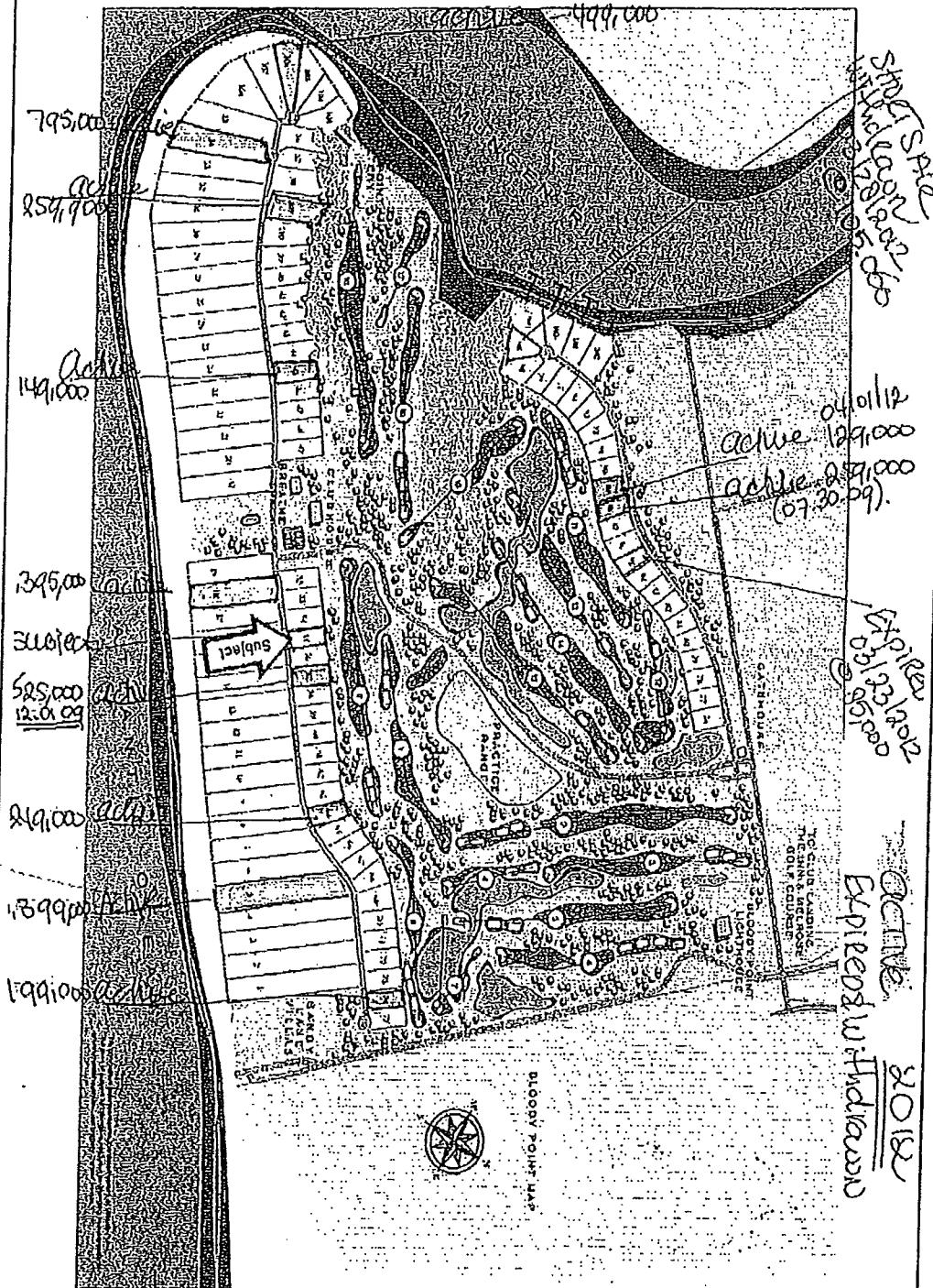


General Map 2

Borrower or Owner N/A
 Property Address 42 Fuskie Lane
 City Daufuskie Island County Beaufort State SC Zip Code 29915
 Client Client: William A. Ashton Jr MD & Michelle C. Ashton



Borrower or Owner N/A
 Property Address 42 Fushie Lane
 City Daufuskie Island County Beaufort State SC Zip Code 29915
 Client Client: William A Ashton Jr MD & Michele C Ashton



DEFINITION OF MARKET VALUE: The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby: (1) buyer and seller are typically motivated; (2) both parties are well informed or well advised, and each acting in what he considers his own best interest; (3) a reasonable time is allowed for exposure in the open market; (4) payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and (5) the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions* granted by anyone associated with the sale.

*Adjustments to the comparables must be made for special or creative financing or sales concessions. No adjustments are necessary for those costs which are normally paid by sellers as a result of tradition or law in a market area; these costs are readily identifiable since the seller pays these costs in virtually all sales transactions. Special or creative financing adjustments can be made to the comparable property by comparisons to financing terms offered by a third party institutional lender that is not already involved in the property or transaction. Any adjustment should not be calculated on a mechanical dollar for dollar cost of the financing or concessions but the dollar amount of any adjustment should approximate the market's reaction to the financing or concessions based on the appraiser's judgment.

STATEMENT OF LIMITING CONDITIONS AND APPRAISER'S CERTIFICATION

CONTINGENT AND LIMITING CONDITIONS: The appraiser's certification that appears in the appraisal report is subject to the following conditions:

1. The appraiser will not be responsible for matters of a legal nature that affect either the property being appraised or the title to it. The appraiser assumes that the title is good and marketable and, therefore, will not render any opinions about the title. The property is appraised on the basis of it being under responsible ownership.
2. The appraiser has provided a sketch in the appraisal report to show approximate dimensions of the improvements and the sketch is included only to assist the reader of the report in visualizing the property and understanding the appraiser's determination of its size.
3. The appraiser has examined the available flood maps that are provided by the Federal Emergency Management Agency (or other data sources) and has noted in the appraisal report whether the subject site is located in an identified Special Flood Hazard Area. Because the appraiser is not a surveyor, he or she makes no guarantee, express or implied, regarding this determination.
4. The appraiser will not give testimony or appear in court because he or she made an appraisal of the property in question, unless specific arrangements to do so have been made beforehand.
5. The appraiser has estimated the value of the land in the cost approach at its highest and best use and the improvements at their contributory value. The separate valuations of the land and improvements must not be used in conjunction with any other appraisal and are invalid if they are so used.
6. The appraiser has noted in the appraisal report any adverse conditions (such as, needed repairs, depreciation, the presence of hazardous wastes, toxic substances, etc.) observed during the inspection of the subject property or that he or she became aware of during the normal research involved in performing the appraisal. Unless otherwise stated in the appraisal report, the appraiser has no knowledge of any hidden or unapparent conditions of the property or adverse environmental conditions (including the presence of hazardous wastes, toxic substances, etc.) that would make the property more or less valuable, and has assumed that there are no such conditions and makes no guarantee or warranties, express or implied, regarding the condition of the property. The appraiser will not be responsible for any such conditions that do exist or for any engineering or testing that might be required to discover whether such conditions exist. Because the appraiser is not an expert in the field of environmental hazards, the appraisal report must not be considered as an environmental assessment of the property.
7. The appraiser obtained the information, estimates, and opinions that were expressed in the appraisal report from sources that he or she considers to be reliable and believes them to be true and correct. The appraiser does not assume responsibility for the accuracy of such items that were furnished by other parties.
8. The appraiser will not disclose the contents of the appraisal report except as provided for in the Uniform Standards of Professional Appraisal Practice.
9. The appraiser has based his or her appraisal report and valuation conclusion for an appraisal that is subject to satisfactory completion, repairs, or alterations on the assumption that completion of the improvements will be performed in a workmanlike manner.
10. The appraiser must provide his or her prior written consent before the lender/client specified in the appraisal report can distribute the appraisal report (including conclusions about the property value, the appraiser's identity and professional designations, and references to any professional appraisal organizations or the firm with which the appraiser is associated) to anyone other than the borrower; the mortgagee or its successors and assigns; the mortgage insurer; consultants; professional appraisal organizations; any state or federally approved financial institution; or any department, agency, or instrumentality of the United States or any state or the District of Columbia; except that the lender/client may distribute the property description section of the report only to data collection or reporting service(s) without having to obtain the appraiser's prior written consent. The appraiser's written consent and approval must also be obtained before the appraisal can be conveyed by anyone to the public through advertising, public relations, news, sales, or other media.

APPRAISER'S CERTIFICATION: The Appraiser certifies and agrees that:

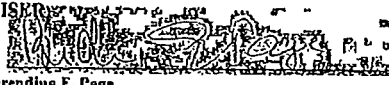
1. I have researched the subject market area and have selected a minimum of three recent sales of properties most similar and proximate to the subject property for consideration in the sales comparison analysis and have made a dollar adjustment when appropriate to reflect the market reaction to those items of significant variation. If a significant item in a comparable property is superior to, or more favorable than, the subject property, I have made a negative adjustment to reduce the adjusted sales price of the comparable and, if a significant item in a comparable property is inferior to, or less favorable than the subject property, I have made a positive adjustment to increase the adjusted sales price of the comparable.
2. I have taken into consideration the factors that have an impact on value in my development of the estimate of market value in the appraisal report. I have not knowingly withheld any significant information from the appraisal report and I believe, to the best of my knowledge, that all statements and information in the appraisal report are true and correct.
3. I stated in the appraisal report only my own personal, unbiased, and professional analysis, opinions, and conclusions, which are subject only to the contingent and limiting conditions specified in this form.
4. I have no present or prospective interest in the property that is the subject to this report, and I have no present or prospective personal interest or bias with respect to the participants in the transaction. I did not base, either partially or completely, my analysis and/or the estimate of market value in the appraisal report on the race, color, religion, sex, handicap, familial status, or national origin of either the prospective owners or occupants of the subject property or of the present owners or occupants of the properties in the vicinity of the subject property.
5. I have no present or contemplated future interest in the subject property, and neither my current or future employment nor my compensation for performing this appraisal is contingent on the appraised value of the property.
6. I was not required to report a predetermined value or direction in value that favors the cause of the client or any related party, the amount of the value estimate, the attainment of a specific result, or the occurrence of a subsequent event in order to receive my compensation and/or employment for performing the appraisal. I did not base the appraisal report on a requested minimum valuation, a specific valuation, or the need to approve a specific mortgage loan.
7. I performed this appraisal in conformity with the Uniform Standards of Professional Appraisal Practice that were adopted and promulgated by the Appraisal Standards Board of The Appraisal Foundation and that were in place as of the effective date of this appraisal, with the exception of the departure provision of those Standards, which does not apply. I acknowledge that an estimate of a reasonable time for exposure in the open market is a condition in the definition of market value and the estimate I developed is consistent with the marketing time noted in the neighborhood section of this report, unless I have otherwise stated in the reconciliation section.
8. I have personally inspected the interior and exterior areas of the subject property and the exterior of all properties listed as comparables in the appraisal report. I further certify that I have noted any apparent or known adverse conditions in the subject improvements, on the subject site, or on any site within the immediate vicinity of the subject property of which I am aware and have made adjustments for these adverse conditions in my analysis of the property value to the extent that I had market evidence to support them. I have also commented about the effect of the adverse conditions on the marketability of the subject property.
9. I personally prepared all conclusions and opinions about the real estate that were set forth in the appraisal report. If I relied on significant professional assistance from any individual or individuals in the performance of the appraisal or the preparation of the appraisal report, I have named such individual(s) and disclosed the specific tasks performed by them in the reconciliation section of this appraisal report. I certify that any individual so named is qualified to perform the tasks. I have not authorized anyone to make a change to any item in the report; therefore, if an unauthorized change is made to the appraisal report, I will take no responsibility for it.

SUPERVISORY APPRAISER'S CERTIFICATION: If a supervisory appraiser signed the appraisal report, he or she certifies and agrees that: I directly supervise the appraiser who prepared the appraisal report, have reviewed the appraisal report, agree with the statements and conclusions of the appraiser, agree to be bound by the appraiser's certifications numbered 4 through 7 above, and am taking full responsibility for the appraisal and the appraisal report.

ADDRESS OF PROPERTY APPRAISED: 42 Fiske Lane, Daufuskie Island, SC 29915

APPRAISER:

SUPERVISORY APPRAISER (only if required):

Signature: 
 Name: Berendina E. Page
 Date Signed: April 15, 2012
 State Certification #: 2571
 or State License #: _____
 State: SC
 Expiration Date of Certification or License: 06/30/2012

Signature: _____
 Name: _____
 Date Signed: _____
 State Certification #: _____
 or State License #: _____
 State: _____
 Expiration Date of Certification or License: _____
☐ Did ☐ Did Not Inspect Property

RECORDED
2012 May -09 12:54 PM

Sharon D. Burns
BEAUFORT COUNTY AUDITOR

BEAUFORT COUNTY SC - ROD
BK 03139 PGS 1408-1410
FILE NUM 2012024234
05/01/2012 04:47:11 PM
REC'D BY R WEBB RCPT# 675416
RECORDING FEES 10.00
County Tax 82.50
State Tax 195.00

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

DEED
(PUBLIC SALE)
CASE NO. 2011-CP-07-03975

To Whom These Presents shall concern:

I, MARVIN H. DUKES, III, MASTER IN EQUITY FOR BEAUFORT COUNTY, IN THE
STATE OF SOUTH CAROLINA, SEND GREETINGS:

WHEREAS, in an action in the Court of Common Pleas, in Beaufort County between **Bank of America, N.A.**, as **Plaintiff**, and **Dennis T. Leibold and Barbara K. Leibold**, as **Co-Trustees of the Leibold Living Trust dated April 28, 2006**, as **Defendants**, by an **Order** dated February 17, 2012, it was decreed that the property hereinafter described should be sold by the Master in Equity for Beaufort County, on the terms and for the purposes mentioned in the Order granted in the case; and

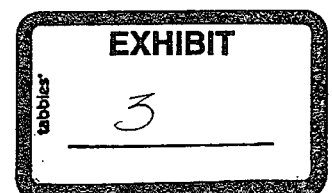
WHEREAS, I, the undersigned Master in Equity for Beaufort County, after due advertisement of the said property for sale at public outcry, did openly and publicly, and after the matter of auction, sell the Property to **David L. Fingerhut and Patricia M. Santry** on April 2, 2012, for the sum of \$75,000.00, said sum being the highest amount bid; and

WHEREAS, a deficiency judgment having been waived by the **Plaintiff**, the bidding was closed.

ADD DMP Record 5/3/2012 04:44:39 PM
BEAUFORT COUNTY TAX MAP REFERENCE

Dist	Map	SMap	Parcel	Block	Week
R800	027	00A	0117	0000	00

HILTONHEAD 763472v1 057455-00001



NOW, THEREFORE, KNOW ALL MEN that I, the undersigned Master in Equity for Beaufort County, pursuant to the foregoing and also in consideration of the said bid paid as aforesaid by **David L. Fingerhut and Patricia M. Santry**, the receipt whereof is hereby acknowledged, **HAVE GRANTED**, sold, released, and by these presents, **DO GRANT**, bargain, and release, the following described real property unto **David L. Fingerhut and Patricia M. Santry**, as **joint tenants with right of survivorship and not tenants in common**, their heirs and assigns (hereafter "Grantees"):

ALL that certain piece, parcel or lot of land situate, lying and being on **Daufuskie Island, Beaufort County, South Carolina**, designated as **Lot Number Ninety-Eight (98) Daufuskie Island Club, Phase II, Bloody Point**, and being more particularly shown on a plat thereof prepared by **Boyce L. Young, SC RLS #11079**, dated **April 17, 1991**, last revised **September 5, 1997**, and recorded in the **Beaufort County Records in Plat Book 62 at Page 14**. For a more detailed description as to the metes and bounds, courses and distances, reference is made to said plat of record.

#R800 027 00A 0117 0000

PRIOR OWNER OF RECORD: (§30-9-31) Dennis T. Leibold and Barbara K. Leibold, as Trustees of the **Leibold Living Trust**, dated **April 28, 2006**.

This being the same property conveyed to **Dennis T. Leibold and Barbara K. Leibold**, as Co-Trustees of the **Leibold Living Trust** dated **April 28, 2006**, by deed of **Dennis T. Leibold and Barbara K. Leibold** dated **August 30, 2007**, recorded **June 9, 2008**, in the Office of the Register of Deeds for **Beaufort County, South Carolina**, in **Deed Book 2732**, at **Page 164**; and to same property conveyed to **Dennis T. Leibold and Barbara K. Leibold** from **Patrick Allison and Maree Hanson** dated **August 30, 2007**, and recorded in **Deed Book 2621 at Page 459**.

This deed was prepared by the MCNAIR LAW FIRM, P.A., Post Office Drawer 3, Hilton Head Island, South Carolina 29938, by Cary S. Griffin.

Grantee's Address: **63 Shipyard Drive, #905, Hilton Head Island, SC 29928**

TOGETHER with all and singular the Rights, Members, Hereditaments and Appurtenances whatsoever to the said Property belonging, or in anywise incident or appertaining; and the reversions and remainders, rents, issues, and profits thereof, and also any estate, right, title, interest dower, possession, benefit, claim or demand therein whatsoever of all parties to the said suit and of all other persons who might rightfully claim the same or any part thereof, by, from, or under them, or either of them.

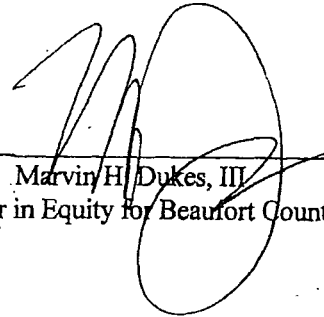
TO HAVE AND TO HOLD the said Property, with its hereditaments, privileges, and appurtenances, unto the said Grantees, their successors and assigns, forever, subject, however, to the rights, conditions and restrictions that constitute covenants running with the land which are set forth or referred to herein or which may otherwise appear of record.

IN WITNESS WHEREOF, I, the said Master in Equity in and for the County aforesaid, under and by virtue of the aforesaid Judgment, have hereunto set my hand and seal, this the 30 day of April, 2012.

Signed, Sealed and Delivered
in the Presence of

Witness

Witness



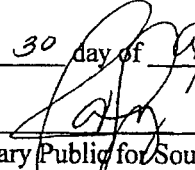
Marvin H. Dukes, III (L.S.)
Master in Equity for Beaufort County, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

ACKNOWLEDGMENT
under SC Code §30-5-30(C)

I Jacqueline Grey, do hereby certify that the Honorable Marvin H. Dukes, III, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this the 30 day of April, 2012.



Notary Public for South Carolina (SEAL)
My Commission Expires: 5/1/22

Bidder's No: 195

Transaction No: 224



**Beaufort County Treasurer
Temporary Tax Receipt**

Delinquent Tax Sale

The Property below is sold for the non-payment of 2011 and / or prior year's tax

Tax Sale Date: 2012-10-01

Owner's Name: TCJ ASSOCIATES INC

Account No: R800 027 00A 0068 0000

Acres: 0.00

Lots:

Buildings:

Key No:

Description:

Bidder's Name: Patricia M Santry

Address: 63 Shipyard Drive Hilton Head Island, SC 29928

Highest Bid Received: \$23,000.00

The Statement below applies to Real Estate & Mobile Homes Only

Treasurer's Title can not be given until after expiration of twelve (12) Months from the date of purchase, as owner, successor in title, judgment, creditor, or mortgagee can redeem same by paying taxes, penalties, and the cost, plus 3% of the purchaser's bid, per quarter. Interest paid on a bid shall not exceed the amount of the opening (Forfeited Land Commission) bid. If sale is voided, the bidder will be refunded to include actual interest earned.

Douglas E. Henderson

Troy Hodges

EXHIBIT

4

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III

Appellate Case No. 2013-000222

Bloody Point Property Owners Association, Inc., David L.
Fingerhut, and Patricia M. Santry).....Respondents,

v.

William A. Ashton, Jr. And Michele C. Ashton.....Appellants.

CERTIFICATE AND PROOF OF SERVICE

I hereby certify that I have served upon the Respondents the Record on Appeal, by depositing a copy thereof in the United States Mail, postage prepaid, on this 4th day of October, 2013, addressed to: Matthew E. Tillman, Esquire, Womble, Carlyle, Sandridge & Rice, LLP, P.O. Box 999, Charleston, SC 29402, (843) 720-4629), Counsel of Record for Respondents, David L. Fingerhut and Patricia Fingerhut (a/k/a Patricia M. Santry).

October 4, 2013



James F. Berl, Esquire (S.C. Bar No. 11197)
LAW OFFICES OF JAMES F. BERL, P.C.
P.O. Box 22626
Hilton Head Island, South Carolina 29926
Telephone: (843) 689-5771
Facsimile: (843) 689-5772

AND

RECEIVED

OCT 07 2013

SC Court of Appeals

Dustin Lee, Esquire (S.C. Bar No. 77428)
LEE LAW FIRM, LLC
P.O. Box 4771
Hilton Head, SC 29938
Telephone: (843) 474-0614
Facsimile: (888) 474-0614
Attorneys for Appellants