

mortgage; Carolina Clean Greer I (Carolina Clean) was named as a defendant because it was a prior operating company and is alleged in the complaint to hold a possible lien on personal property located on the property; and Community Development & Improvement Corporation (CDIC) was named as defendant because it holds a subordinate lien on the property. Parker had personally guaranteed the SBA loan in the amount of \$133,000.00.

Parker filed an answer and counterclaim against BB&T on September 1, 2011.

On September 16, 2011, Super Suds, LLC purchased the subject loan from BB&T and accepted an assignment of mortgage. On October 27, 2011, Parker and CPH dismissed their counterclaims against BB&T. On October 31, 2011, Super Suds was substituted as Plaintiff and a Notice of Appearance was filed by Allan Hill.

Allan Hill, attorney for Super Suds, drafted and sent a deed-in-lieu of foreclosure (DIL) to defendant Parker through which Parker on behalf of CPH conveyed title to the subject property to Super Suds, the holder of the first mortgage loan. Mr. Parker promptly executed the deed-in-lieu on October 24, 2011, and returned it to Mr. Hill.

The DIL purported to convey absolute title to the property and provides, in pertinent part, as follows:

The consideration for this deed is the satisfaction and cancellation of the indebtedness from the Grantor to the Grantee as evidenced by its mortgage dated October 21, 2005, which mortgage was recorded in the ROD mortgage book 3542, at page 190. The loan balance of said mortgage and the note secured by said mortgage is the sum of \$601,427.10, together with accrued interest as computed as the annual percentage rate as set forth in the note.

Grantor, in executing and delivering this deed to Grantee, acknowledges that this is an absolute deed and not a mortgage. Grantor further acknowledges that he is conveying complete title to the above described property to the Grantee herein and the Grantor has no further interest of any nature whatsoever in and to the

above described property or any improvements thereon.

DIL dated October 24, 2011.

Immediately after delivery of the DIL, Super Suds assumed possession of the property and began operating its business. Super Suds has operated the car wash continuously since that time on the property. After assuming possession of the property in 2011, Super Suds erected a new sign indicating Super Suds was operating the car wash and made improvements to the property. Super Suds admits that it has commingled the revenue derived from this car wash with income from the other car washes that it owns and is unable to provide an exact accounting for this location.

The case lay dormant on the roster for the Court of Common Pleas from October 31, 2011 to September 25, 2014, when an order of reference was consented to by Super Suds and allegedly by CPH and Parker. The Consent Order is signed by attorney Allan Hill purportedly on behalf of both parties. The matter came before this Court on September 12, 2016, for a hearing and the Court ordered the hearing continued to allow time for discovery. Notices of Appearances have been filed by Charles LeGrand on behalf of the plaintiff and Max Hyde, Samantha Nicholson and Barbara Brunson on behalf of the defendants Parker and CPH. After the September 12, 2016 hearing, activity commenced on the matter. Defendants Parker and CPH filed a motion to dismiss on April 5, 2017. Plaintiff filed a Motion for a Declaration under Rule 43 of the SCRPC on April 18, 2018. The parties have engaged in discovery.

At a status conference held on May 21, 2018, the Court scheduled a hearing on the Motion to Dismiss and Motion for a Declaration under Rule 43 of the SCRPC for July 17, 2018. The Court further ordered that counsel prepare and file briefs in support of their respective motions by July 9, 2018. On July 9, 2018, Plaintiff's counsel and Defendant's counsel filed

briefs in support of their respective motions. In addition, Defendant's counsel filed a memorandum in opposition to the Motion for Declaration under Rule 43. In its Memorandum in Support of Motion to Dismiss or in the Alternative Motion for Summary Judgment, Defendant asserted that the Motion to Dismiss would be converted to a motion for summary judgment pursuant to Rule 12(b) SCRPC. No objection was raised to the converting Defendant's motion to dismiss to a motion for summary judgement prior to or at the hearing.

The record before the court on the hearing of these motions includes the pleadings; the case history of record in the Spartanburg County Court of Common Pleas; excerpts from the depositions of Ken Howard dated June 14, 2018, owner of the plaintiff Super Suds, and Walt Parker Defendant and principal of the Defendant CPH, dated June 14, 2018; and an Affidavit of Walt Parker filed August 4, 2017.

II. STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC, *See Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). The moving party may discharge the burden of demonstrating the absence of a genuine issue of material fact by pointing to the absence of evidence to support the nonmoving party's case. *See Lanham v. Blue Cross and Blue Shield of S.C., Inc.*, 349 S.C. 356, 563 S.E.2d 331 (2002). "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860. "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004).

III. FINDINGS OF LAW

Defendant Parker claims that (1) when the deed-in-lieu of foreclosure (DIL), which had been drafted and sent to him by the attorney for Super Suds, was returned to Mr. Hill, a merger of title occurred as a matter of law pursuant to the unambiguous language of the DIL, and (2) even if the language in the DIL had not been clear, the intent to convey title to the property may be ascertained by the actions of the parties. Therefore, Super Suds lacks standing to pursue this foreclosure action because it holds title to the property.

With respect to the doctrine of merger, the South Carolina Supreme Court has held that "...[w]hen the holder of a mortgage acquires the equity of redemption or the legal title to the land merger will take place, unless the parties intend otherwise." *Thompson v. Hudgens*, 161 S.C. 450, 161 S.E. 807, 810 (S. C. 1931). Equitable encumbrances cease to exist when the equitable and legal titles vest in the same person. *See also* *First Federal Savings and Loan Assn. of South Carolina v. Finn*, 300 S.C. 228, 387 S.E.2d 253, 254 (S. Ct. 1989).

Further, the Court in *Finn*, noted that the interpretation of a deed is an equitable matter and construction of a clear and unambiguous deed is a question of law for the Court. *See* *Gardner v. Mazingo*, 293 SC 23, 358 S.E. 2d 390 (1987); *see also* *Bennet v. Investors Title Ins., Co.*, 370 S.C., 635 S.E.2d 660 (S.C. App. 2006); *Penza v. Pendleton Stations LLC*, 404 S.C. 198, 743 S.E. 2d 850 (S.C. App. 2013). To determine the intent of the parties to a deed, the court must look first to the language of the deed. If the language is ambiguous or unclear, the court may resort to extrinsic evidence. *Id.*

The language in the DIL clearly states that "...[g]rantor further acknowledges that he is conveying complete title to the above described property to the Grantee herein and the Grantor has no further interest of any nature whatsoever..." In addition, the DIL provides that: "The

consideration for this deed is the satisfaction and cancellation of the indebtedness from the Grantor to the Grantee.” This language in the DIL clearly provides that the grantor conveyed absolute title to the grantee. As such the legal and equitable interests in the property merged and the equitable interest (mortgage) was extinguished.

Plaintiff claims that acceptance of the DIL was conditioned on Super Suds successful negotiations with the SBA for release of its mortgage. The DIL does not indicate that it is conditional on any further actions by the grantee or Super Suds.

To the extent there was any ambiguity in the DIL, well recognized rules of construction provide that any ambiguity must be construed against the drafter. *Duncan v. Little*, 384 S.C.420, 682 S.E.2d 788 (2009) (rejecting the argument that an agreement was ambiguous and noting that even if there were an ambiguity, it would be construed against the drafter). Here Plaintiff’s attorney prepared the DIL. If Super Suds had intended to take the DIL with conditions, the drafter could have included conditional language in the DIL. Instead, the DIL clearly purports to convey absolute title and extinguish the related debt. Therefore, the DIL should be construed to be unconditional.

Even if the DIL had not expressly conveyed absolute title, the intent of the parties is evident from Super Suds actions upon purchasing the BB&T loan and delivery of the DIL to its attorney. The parties do not dispute the fact that Super Suds assumed possession of the property and began to operate a car wash thereon. Super Suds changed the signage to indicate that it was operating the car wash, and Super Suds made improvements to the property. Super Suds mingled the revenue it received from this car wash with revenue that it received from other car washes that it operated and never provided an accounting to CPH as a mortgagee in possession. These undisputed facts show that Super Suds took possession of the property as an owner.

No activity occurred in this matter from October 31, 2011, until September 2014. The matter was referred to the Master on September 25, 2014, and still no activity occurred in the case until the hearing held on September 12, 2016. During all this time, Super Suds continuously operated a business on the property and represented that it was the owner of the property. Super Suds was unable to explain why the foreclosure languished for five years. The length of time that this case remained dormant demonstrates that Super Suds did not intend to pursue the foreclosure and considered that it owned the property.

The Court finds that the provisions of the DIL itself are clear and unambiguous. The DIL provides for the transfer of absolute title to Super Suds and for the cancelation of any indebtedness owed to Super Suds. As such, legal and equitable title to the subject property merged, the mortgage ceased to exist, and Super Suds has no standing to pursue this foreclosure action. The DIL specifically states that the consideration for the conveyance is satisfaction of any debt owed by the grantor to the grantee. Super Suds' attorney drafted the DIL and the deed includes no caveats or conditions that indicate any intent that it conveyed less than absolute title or that the conveyance was conditional. Super Suds took possession of the property and acted as an owner, operating its business there since 2011. Although Super Suds claims Mr. Hill's acceptance of the DIL was conditional, Super Suds has produced no evidence that Mr. Hill made such a representation to Parker. Nor has Super Suds produced any other evidence to indicate that its attorney's acceptance of the DIL was conditional or that its attorney performed any follow-up activities consistent with conditional acceptance. Five years elapsed from the time Super Suds was substituted as Plaintiff and the resumption of activity on this foreclosure in 2016. This further demonstrates that Super Suds did not intend to pursue the foreclosure and considered itself to hold legal title to the property on which it operated its business.

III. CONCLUSION

For these reasons, the Court finds that as a matter of law, the legal and equitable interest in the subject property merged upon delivery of the DIL to plaintiff's attorney and Super Suds has no standing to pursue this foreclosure action. Defendants' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

[JUDGE'S ELECTRONIC SIGNATURE TO FOLLOW]



Spartanburg Common Pleas

Case Caption: Branch Banking And Trust Company , plaintiff, et al VS Carolina Properties Holdings Llc , defendant, et al
Case Number: 2011CP4200500
Type: Order/Summary Judgment

It is So Ordered

s/Judge Gordon G Cooper-3065