



Additionally, the United States of America, by and through the Small Business Administration (hereinafter "SBA") holds a mortgage to secure a promissory note (collectively hereinafter "SBA Loan"), entered into and modified in 2007. Parker also personally guaranteed the SBA loan in the amount of \$133,000.00. Carolina Clean Greer I (Carolina Clean) was named as a defendant because it may have held an interest in the property as an operator and holds a possible lien on personal property located on the property. Community Development and Improvement Corporation (hereinafter the "CDIC") is the holder of an expired security of equipment fixed to the Property.

On February 2, 2011, BB&T filed the above-captioned foreclosure action against CPH, as the borrower, and Parker personally, as the guarantor. BB&T named SBA and CDIC as junior lienholders.

After CPH defaulted on the Note, Super Suds purchased the Note from BB&T. The sale of the Note was conditioned on Parker's execution of a Settlement and Mutual Release of Claims as to BB&T. Super Suds also received an executed Deed in Lieu of Foreclosure as to the Property.

In 2011, BB&T was represented by Weyman Carter of McNair Law Firm, P.A. Super Suds was and continues to be represented by Allan Hill. CPH and Mr. Parker were represented by Leon Jones of Jones & Walden during the initial stages of the BB&T foreclosure. Parker acted on behalf of himself and CPH, without representation, during negotiations with Allan Hill. CPH and Parker retain additional counsel in 2016 hiring Hyde Law Firm, P.A.

On August 18, 2011, Super Suds purchased the BB&T loan for \$200,000. At that time, the loan balance was \$601,427.10, and Super Suds was aware of both junior

lienholders, the SBA and CDIC. On September 20, 2011, Parker communicated with Allan Hill via email that he planned to execute a Settlement Agreement and Mutual Release of Claims with BB&T, and sought to confirm that Ken Howard, Super Suds, LLC and/or the new note holder would not pursue a deficiency judgment against CPH or him personally. Allan Hill responded that Mr. Parker's understanding was correct. On September 23, 2011, as a condition of the BB&T note sale, Mr. Parker and CPH signed a Settlement and Mutual Release of Claims with BB&T, effective September 19, 2011. On October 27, 2011, CPH and Parker dismissed their counterclaims.

Allan Hill drafted a Deed in Lieu of Foreclosure, which he sent to Mr. Parker for execution. On October 24, 2011, Walt Parker executed the Deed in Lieu of Foreclosure (hereinafter "DIL") and delivered the DIL to Allan Hill's office. According to the DIL, Super Suds received absolute title to the Property with consideration for this deed being the satisfaction and cancellation of an indebtedness from the Grantor.

On October 31, 2011, the Circuit Court signed a Consent Order Substituting Parties Pursuant to Rule 25(c) and Substituting Counsel, which was filed by BB&T and signed by attorneys for BB&T, Super Suds, SBA and CDIC. Accordingly, Super Suds stepped into the shoes of BB&T as plaintiff in the above-captioned matter. At approximately the same time in 2011, CPH and Mr. Parker surrendered the Property to Super Suds. Super Suds took possession of the Property and has operated its business there since that time.

On August 3, 2016, Plaintiff filed an Amended Lis Pendens and Notice of Appearance of Charles LeGrand. On December 5, 2017, Defendants filed an Amended Answer and Counterclaims. Plaintiff contends that several defenses and counterclaims of

Defendants should fail because there is no settlement agreement between Super Suds and CPH and Parker enforceable under Rule 43(k), SCRPC, including: CPH's and Parker's Third Defense (Merger of Title), Fourth Defense and Counterclaim (Breach of Contract), Seventh Defense and Counterclaim (South Carolina Unfair Trade Practices Act), Ninth Defense and Counterclaim (Fraud), Tenth Defense and Counterclaim (Unconscionability), Fifteenth Defense (Accord and Satisfaction), and any other defense CPH and Parker contend are based upon an alleged settlement agreement.

Plaintiff contends that no agreement affecting this proceeding is binding unless one of the conditions of Rule 43 (k), SCRPC, is met. Defendants dispute that Rule 43 (k), SCRPC, applies. Defendants also assert that a merger of title occurred when the Deed in Lieu of Foreclosure was delivered to Super Suds attorney, extinguishing the underlying debt and the equitable mortgage interests in the property. Defendants have not filed a motion to compel a settlement agreement.

## II. STANDARD OF REVIEW

Rule 43(k), SCRPC, states:

No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel...

Rule 43(k), South Carolina Rules of Civil Procedure.

The Supreme Court's discussion of the applicability of Rule 43(k), SCRPC, involves parties represented by counsel seeking to compel a settlement agreement. *See*

*Farnsworth*, 627 S.E.2d 724, 726, 367 S.C. 634 (S.C., 2006) (holding that Rule 43(k) applied to a letter signed by both counsels); *see also Ashfort Corporation v. Palmetto Construction Group, Inc.*, 458 S.E.2d 533, 535, 318 S.C. 492, 493 (S.C., 1995) (holding that Rule 43(k) applied to a settlement agreement signed by the parties and confirmed by counsel). "Rule 43(k) is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation . . . [and it] is applicable to settlement agreements." *See id.* at 534 and 493-4. In *Galloway*, the Court of Appeals emphasizes that compliance with Rule 43(k) is a burden placed on an attorney to motivate the attorney to protect his client's interest by reducing the agreement to writing with material terms and conditions of the agreement. *See Galloway*, 481 S.E.2d at 716, 325 S.C. at 547.

Regarding whether Rule 43(k) applies to settlement agreements pending litigation, the Supreme Court states in *Farnsworth*, "[u]nder our general rules of construction, the words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Farnsworth*, 627 S.E.2d at 726, 367 S.C. at 634 (quoting *State v. Muldrow*, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2002)). "In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes." *Id.* (quoting *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003)). Ultimately, the *Farnsworth* Court required strict compliance with the requirements of Rule 43 (k) "because Rule 43 (k) plainly applies to all settlement agreements signed by counsel." *Id.* (emphasis added).

### III. FINDING REGARDING RULE 43(k), SCRPC

Accordingly, Rule 43(k), SCRPC, is not applicable because that Defendants, Parker and CPH, were unrepresented during the negotiations with attorney Allan Hill and at the issuance of the Deed in Lieu of Foreclosure. The burden of compliance with Rule 43(k) is placed on attorneys rather than unrepresented parties. Furthermore, the rules of statutory construction show that Rule 43(k) should not apply to pro se litigants. The plain and ordinary meaning should be given to Rule 43(k), and accordingly the rule should be applied to "agreement[s] between counsel". Rule 43 (k), SCRPC.

Neither Defendants nor Plaintiff presented to the court a settlement agreement meeting the requirements of Rule 43(k), SCRPC. Allowing Plaintiff to utilize Rule 43(k), SCRPC, to avoid Defendants' defenses and counterclaims would be unjust given that Defendants were not represented by counsel and have not sought to compel a settlement agreement. Instead, the parties' intention is evidenced by the transfer of title to the subject property via the Deed in Lieu of Foreclosure. Accordingly, Plaintiff's use of Rule 43(k) to fail Defendants' defenses and counterclaims is misplaced.

### III. CONCLUSION

For the foregoing reasons, the Court finds that Rule 43(k) shall not be applied in this matter and Plaintiff's Motion for Declaration Under Rule 43(k), SCRPC is DENIED.

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:** Master/Order/Other

It is So Ordered

s/Judge Gordon G Cooper-3065

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