

I. FACTUAL FINDINGS

1. On February 2, 2011, Branch Banking & Trust (BB&T) filed the above-captioned case to foreclose a mortgage securing a note owed to BB&T by CPH. The original amount owed on the note was \$585,000.00.

2. The mortgage encumbers real property in Spartanburg County on which a car wash was operating that was owned by CPH.

3. The United States of America, by and through the Small Business Administration (SBA), was named as a party because it holds a subordinate 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.

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

5. On September 16, 2011, Super Suds, LLC purchased the subject loan from BB&T and accepted an assignment of mortgage.

6. On October 27, 2011, Parker and CPH dismissed their counterclaims against BB&T.

7. On October 31, 2011, Super Suds was substituted as Plaintiff and a Notice of Appearance was filed by Allan Hill.

8. 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.

9. Parker promptly executed the DIL on October 24, 2011, and returned it to Mr. Hill.

10. 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.

11. 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.

12. 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 moved the case to the Master-in-Equity.

13. 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.

14. After the September 12, 2016 hearing, activity commenced on the matter.

15. Defendants Parker and CPH filed a motion to dismiss on April 5, 2017. Plaintiff filed a Motion for a Declaration under Rule 43(k) of the SCRCPC on April 18, 2018. The parties since engaged in discovery.

16. On July 17, 2017, the Court heard the Defendant's Motion to Dismiss, and Plaintiff's Motion for a Declaration under Rule 43(k) of the SCRCPC.

17. 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.

18. Thereafter, on September 27, 2018, this Court signed and filed an Order Denying Plaintiff's Motion for Declaration Under Rule 43(k), SCRCPC, and an Order Granting Defendant Carolina Properties Holdings, LLC, and Walter W. Parker, IV's Motion for Summary Judgment.

19. On October 8, 2018, Plaintiff filed motions to reconsider each order.

20. On October 29, 2018, Defendants, CPH and Parker, filed a Motion to Strike.

II. DISCUSSION

The Court considered all factors and the full record in determining whether to grant Defendant's Motion for Summary Judgment. The Court granted Defendant's Motion for Summary Judgment on the grounds that a merger of title occurred when Plaintiff Walt Parker signed the deed in lieu of foreclosure (DIL) and delivered it to the Super Suds' attorney. In granting the motion for summary judgment, the Court invoked its equitable powers to put into place that "...which ought to have been done." See Kerr v. City of Columbia, 232 S.C. 405, 102

S.E. 2d 364, 366 (S. Ct. 1958) (affirming the decision of the master in equity that "...the court will regard as done that which ought to have been done."); Regions Bank v. Wingard Properties, Inc. 394 S.C. 241, 715 S.E. 2d 348, 352-353 (S.Ct. App. 2011) (noting that the case at issue involved several maxims of equity including "...equity regards as done that which ought to have been done").

The Court's ruling on Summary Judgment shall stand based on the merger of title that occurred upon delivery of the DIL to Plaintiff's attorney. As such, Super Suds has no standing to pursue this foreclosure action. The Court found the parties' intended to convey property evidenced by the transfer of title to the subject property via the deed in lieu of foreclosure and Super Suds' uninterrupted possession of the property since 2011 without record of an accounting of rents and profits.

Plaintiff argues that it received insufficient notice that the motion to dismiss would be converted to a motion for summary judgment. At Status Conference in May 9, 2018, the Court set hearings for all pending motions for July 17, 2018, including Defendant's Motion to Dismiss and Plaintiff's Motion for Declaration under Rule 43(k). The Court requested briefs be filed by July 9, 2018. Defendants filed its Brief converting the Motion to Dismiss into a Motion for Summary Judgment on July 9, 2018. Plaintiff notes that the Defendant's Brief was filed fewer than 10 days prior to the Court's hearing date.

Rule 12(c) states "[i]f on motion for judgment on the pleadings matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56. While Rule 56(c) does state that motions for summary judgment shall be served 10 days prior to a

hearing, the Court of Appeals has also ruled that “[p]ursuant to Rule 56 ‘all parties should have been given a reasonable opportunity to present all materials such as affidavits, depositions, etc., pertinent to a motion on summary judgment.’” *Lee v. Kelley*, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989).

Plaintiff did not object to the procedural posture of the Motion for Summary Judgment that had been noted in Defendants’ brief in support of its motion prior to the hearing or at the hearing. Defendant filed its brief within the time required by the Court. Plaintiff submitted no response to Defendant’s motion or its brief thereof. Instead, Plaintiff was present at the hearing and argued in opposition to the summary judgment motion. Plaintiff had reasonable opportunity to present evidence in opposition to the Motion for Summary Judgment, but Plaintiff did not present evidence in opposition until after the Court’s oral ruling, but prior to the entry of an Order on the Motion for Summary Judgment on the issue. Plaintiff had the opportunity to submit amendments to the proposed order, and did so. Yet, none of Plaintiff’s current objections to the Order were included.

Accordingly, the Plaintiff’s motion to reconsider the order granting Defendant’s motion for summary judgment on the grounds that Plaintiff had insufficient notice that the motion would be argued as a motion for summary judgment is denied because Plaintiff had reasonable notice that the motion would be converted when the brief in support of the motion was filed in accordance with the Scheduling Order and Plaintiff waived any objection to the timing of the conversion when Plaintiff failed to raise the objection prior to or at the hearing.

Plaintiff claims that Defendant’s motion is a motion to enforce a settlement agreement. However, the Court ruled that delivery of the DIL was an effective merger of title, and Plaintiff had no standing to pursue foreclosure. The Court found, “[w]hen the deed-in-lieu of foreclosure

(DIL), which had been drafted and sent to [Parker] 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 ...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.” The Court ruled on doctrine of merger of title rather than a purported settlement agreement. The Court considered Super Suds’ immediate possession of the property, no separate accounting for rents and profits, length of time the case languished on the docket, and lack of follow-up from Super Suds’ counsel to determine effective delivery and merger.

III. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiff’s Motion for Reconsideration of the Granting Defendant’s motion for Summary Judgment 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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