ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Appellate Case No. 2014-001285

National Security Fire and Casualty Company, Plaintiff,

v.

Rosemary Jenrette, AKA Rosemary Long Jenrette and Horry County State Bank, Defendants,

Of whom

Rosemary Jenrette, AKA Rosemary Long Jenrette is the Appellant,

and

Horry County State Bank is the Respondent.

AMENDED FINAL BRIEF OF APPELLANT

William W. DesChamps, Jr.
William W. DesChamps, III
DesChamps Law Firm
1357 21st Avenue North, Suite 102
Myrtle Beach, South Carolina 29577
(843) 448-2391
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN FINDING THAT THERE WAS A DEBT AND SPECIFIC PROPERTY TO WHICH THE DEBT ATTACHED WHEN THE APPELLANT WAS NOT OBLIGATED TO PAY ANY INDEBTEDNESS TO THE RESPONDENT, AND THE RESPONDENT WAS NOT NAMED AS A LOSS PAYEE OR ADDITIONAL INSURED UNDER THE INSURANCE POLICY THE APPELLANT OBTAINED PRIOR TO THE EXECUTION OF THE MORTGAGE?

II. DID THE TRIAL COURT ERR IN FINDING THAT THE APPELLANT WAS BOUND BY A COVENANT IN THE MORTGAGE TO INSURE HER REAL PROPERTY FOR BETTER SECURITY OF THE RESPONDENT WHEN THE MORTGAGE WAS A STANDARD MORTGAGE THAT DID NOT PROVIDE THAT ANY INSURANCE POLICY OR INSURANCE PROCEEDS SHALL, MAY, OR WILL SERVE AS SECURITY FOR THE MORTGAGE DEBT?

III. DID THE TRIAL COURT ERR IN FINDING THAT THERE WAS AN EXPRESS INTENT THAT THE INSURANCE PROCEEDS SERVE AS ADDITIONAL SECURITY FOR THE PAYMENT OF THE MORTGAGE DEBT WHEN THE AGREEMENT BETWEEN THE PARTIES, AS SET FORTH IN THE MORTGAGE, DOES NOT PROVIDE THAT ANY INSURANCE POLICY OR INSURANCE PROCEEDS, SHALL, MAY, OR WILL SERVE AS SECURITY FOR THE MORTGAGE DEBT, AND THE RESPONDENT NEVER CONTACTED NOR REQUIRED THE APPELLANT TO OBTAIN INSURANCE FOR ITS BENEFIT?

IV. DID THE LOWER COURT ERR IN FINDING THAT THE ASSIGNMENT SET FORTH IN PARAGRAPH 3B OF THE MORTGAGE SURVIVED THE CANCELLATION OF THE MORTGAGE AND BINDS THE APPELLANT WHEN THE APPELLANT WAS NOT PERSONALLY LIABLE UNDER THE MORTGAGE AND WAS NOT OBLIGATED UNDER THE DEFICIENCY JUDGMENT AS A JUDGMENT DEBTOR TO PAY THE RESIDUE OF THE MORTGAGE DEBT REMAINING UNSATISFIED AFTER HER REAL PROPERTY WAS SOLD AT FORECLOSURE?

STATEMENT OF THE CASE

On November 3, 2011, Plaintiff National Security Fire & Casualty Company ("Insurer") filed this interpleader action naming Appellant Rosemary Jenrette, also known as Rosemary Long Jenrette ("Jenrette"), and Respondent Horry County State Bank ("Bank") as party defendants (R. p. 43). This action was commenced by the Insurer as a result of competing claims made by Jenrette and the Bank for insurance proceeds in the sum of $105,000.00 (R. p. 7). Jenrette and the Bank timely responded to the Insurer's complaint and asserted cross-claims against one another claiming entitlement to the entire sum of the disputed insurance proceeds that were deposited by the Insurer into an escrow account (R. p. 7). Jenrette, by way of a claim for declaratory judgment, seeks an order declaring that she is solely entitled to the disputed insurance proceeds as the named insured under an insurance policy issued by the Insurer insuring the parcel of real property ("Subject Real Property") bearing Tax Map Number 123-00-02-069 and located at 104 Country Club Drive, Conway, South Carolina (R. p. 7) (R. p. 48) (R. pp. 280-283). Jenrette claims that she is solely entitled to the disputed insurance proceeds because the insurance policy was obtained by her own will, and her relationship, as a non-debtor mortgagor, with the Bank terminated when the subject mortgage was satisfied (R. p. 48). The Bank claims an equitable lien on the disputed insurance proceeds (R. p. 7) because it was awarded judgment of foreclosure on April 22, 2011 and a deficiency judgment against the debtors on September 6, 2011 (R. p. 53). In support of its claim, the Bank alleged that Jenrette was the mortgagor under the subject mortgage instrument's contract terms, and that she defaulted on her obligations under the mortgage by failing to provide an insurance policy for the Bank's benefit (R. p. 53). The Insurer was released as a party

after the filing of the interpleader action and payment of the disputed insurance proceeds into the Clerk of Court's Office for Horry County (R. p. 40).

On May 16, 2012, the Bank filed a motion for summary judgment as to the relief set out in Jenrette's answer and cross-claim (R. p. 72). The Bank asserted that Jenrette's failure to maintain insurance for the Bank's benefit breached the terms of the subject mortgage, and that the alleged breach gave rise to an equitable lien on the disputed insurance proceeds even though the Bank could not obtain a deficiency judgment against Jenrette as she was not obligated on the promissory note (R. p. 81). On October 4, 2012, the trial court issued an order granting the Bank's motion for summary judgment which found that Jenrette breached the obligations under the terms of the subject mortgage, and that the Bank held an equitable lien on the disputed insurance proceeds (R. pp. 38-41). Thereafter, Jenrette timely filed and served a motion to reconsider the trial court's prior order of October 4, 2012 that granted the Bank's motion for summary judgment (R. p. 31). Jenrette, in support of her motion to reconsider, asserted that the prior order of October 4, 2012 incorrectly found that she breached the terms of the subject mortgage, and that the order made an incorrect conclusion of law with respect to its finding of an equitable lien (R. pp. 31-32). A hearing was held on January 23, 2013 (R. p. 31) and the trial court issued an order granting Jenrette's motion to reconsider on March 5, 2013 (R. p. 31). The order of March 5, 2013 found that the rights and obligations of Jenrette and the Bank with respect to one another were terminated upon the filing of the mortgage satisfaction (R. p. 35), and denied the Bank's motion for summary judgment as the trial court found that Jenrette was not liable for the outstanding indebtedness remaining unsatisfied after the foreclosure sale of the Subject Real Property (R. p. 37). Jenrette

filed a motion for summary judgment on June 3, 2013 seeking an order directing payment to her of the disputed insurance proceeds held on deposit (R. p. 88). In support of her motion for summary judgment, Jenrette asserted that the subject mortgage and the covenants contained therein were terminated upon the filing of the mortgage satisfaction, and that the Bank failed to make a showing sufficient to establish an equitable lien (R. pp. 88-89). On August 30, 2013, the trial court issued an order denying Jenrette's motion for summary judgment (R. p. 21), and the matter was tried as a non-jury trial before the Honorable George C. James, Jr., on December 17, 2013 (R. p. 7). At trial, the Bank claimed that paragraph 3 of the subject mortgage pledged insurance proceeds for any insurance policies Jenrette might have to the Bank (R. p. 147, line 23-p. 148, line 1) (R. p. 149, lines 13-18), and asserted that an equitable lien arose as a result of the loan commitment and agreement to provide insurance (R. p. 261, lines 1-14). Jenrette claimed that she was solely entitled to the disputed insurance proceeds as she was the named insured under the insurance policy (R. p. 1), and that any obligations she had under the subject mortgage were determined and terminated upon the filing of the mortgage satisfaction (R. p. 12). On February 11, 2014, the trial court issued an order ("Trial Order") which found that Jenrette was bound by the assignment in the subject mortgage, and that the assignment survived the cancellation of the mortgage (R. p. 13). The Trial Order also found that the Bank held an equitable lien on the disputed insurance proceeds since the successful bid at the foreclosure sale was in an amount less than the residue of the mortgage debt remaining unsatisfied after the foreclosure sale of the Subject Real Property (R. p. 18). Thereafter, Jenrette timely filed a motion to reconsider the Trial Order (R. p. 2). Jenrette claimed that the trial court erred by making findings of fact that

were not supported by the evidence introduced during the trial, by not making findings of fact that were supported by the evidence introduced during the trial, by making various incorrect conclusions of law, and by not considering or ruling upon various issues raised during the trial that had a direct and substantial bearing on the determinative issues of fact and law (R. p. 91). The trial court issued an order on June 3, 2014 ("Final Order") denying Jenrette's motion to reconsider (R. p. 2). The trial court amended the Trial Order in part and found that the promissory note was executed by Michael Brooks Quickel on May 1, 2009, that the subject mortgage was initially recorded on May 4, 2009 and re-recorded on May 5, 2009, and that it erred in finding that the power of attorney granted authority to Jenrette's attorney-in-fact to execute the promissory note in Jenrette's name (R. pp. 2-3). The Final Order found that the trial court failed to specifically make the fourteen findings of fact that Jenrette claimed were supported by the evidence introduced during the trial (R. p. 4). However, the trial court rejected Jenrette's motion that the Trial Order be amended to include Jenrette's fourteen proposed findings of fact as it found that those findings of fact were of no real import to the ultimate decision of the case (R. p. 4). On June 11, 2014, Jenrette served the Notice of Appeal on the Bank. The Trial Order and the Final Order are the subjects of this appeal. Jenrette received notice of entry of the Final Order on June 4, 2013.

STATEMENT OF FACTS

This interpleader action was commenced by the Insurer as a result of competing claims made by Jenrette and the Bank for insurance proceeds in the sum of $105,000.00 ("Insurance Proceeds") that were deposited by the Insurer into an escrow account (R. p. 7). The Subject Real Property was conveyed unto Jenrette pursuant to the deed of

conveyance recorded in the Horry County Register of Deeds on September 11, 2007 in Deed Book 3275 at Page 2145 (R. p. 236, lines 4-6) (R. pp. 280-283). On March 9, 2009, Jenrette obtained casualty and liability coverage through Bradham Insurance Agency ("Bradham") insuring the Subject Real Property against loss or damage for fire and other hazards (R. pp. 8-9) (R. p. 266, lines 14-20). Jenrette paid the sum of $397.00 as a premium to purchase insurance coverage under a policy issued by the Insurer (R. p. 287) (R. p. 116, line 6–p. 117, line 19). The Bank did not request Jenrette to pay the $397.00 sum for the insurance coverage (R. p. 239, lines 8-10). The insurance policy issued by the Insurer ("Insurance Policy") was a dwelling and mobile home insurance policy that provided dwelling fire policy coverage and personal liability coverage in the sum of $100,000.00 for the policy period of March 9, 2009 to March 9, 2010 (R. p. 118, lines 8-11) (R. p. 286) (R. pp. 289-300). Jenrette paid the premiums on the Insurance Policy, including the premium in the sum of $571.00 to renew the Insurance Policy in March of 2010 (R. p. 124, lines 1-13) (R. p. 239, line 11–p. 240, line 6). Jenrette did not consult with the Bank regarding the $571.00 sum she paid to renew the Insurance Policy, and she renewed the Insurance Policy for her sole benefit at the time of the March 9, 2010 renewal (R. p. 240, lines 10-21). The Insurance Policy's declaration's page for the policy period of March 9, 2009 to March 9, 2010 does not contain a mortgagee name, an address for any mortgagee, or a loan number referencing or relating to any mortgage loan (R. p. 122, lines 3-11) (R. p. 286). The declaration's page for the policy period of March 9, 2010 to March 9, 2011 does not contain a mortgagee name, an address for any mortgagee, or a loan number referencing or relating to any mortgage loan (R. p. 311).

Michael Brooks Quickel ("Quickel") sought to obtain a loan from the Bank to refinance existing debt and obtain business capital (R. p. 9). On April 24, 2009, Quickel, individually and on behalf of Cajun Carolina, LLC ("Cajun"), executed a loan commitment letter ("April 24, 2009 Loan Commitment") which listed Cajun as the "Borrower" and provided that certain real property, including the Subject Real Property, would be pledged as collateral (R. p. 9) (R. p. 383). The loan transaction was based upon the April 24, 2009 Loan Commitment (R. p. 128, line 13-p.129, line 21). Jenrette executed a power of attorney, dated April 27, 2009 ("April 27, 2009 POA"), to pledge part of her real property as collateral for the proposed loan (R. p. 217, line 11-p. 219, line 13). A document entitled "Agreement to Provide Insurance," dated May 1, 2009 ("Cajun Agreement to Provide Insurance"), was executed by Quickel, as member of Cajun, and Ann Marion, as Assistant Vice President of the Bank (R. p. 424). The Cajun Agreement to Provide Insurance sets forth the telephone numbers and addresses of Bradham and the Insurer, and lists the policy number and policy period pertaining to the Insurance Policy (R. p. 424). Quickel did not sign the April 24, 2009 Loan Commitment as Jenrette's attorney-in-fact as he executed it prior to the effective date of the April 27, 2009 POA (R. p. 10). On May 1, 2009, Quickel, in his capacity as member of Cajun, executed and delivered a promissory note to the Bank ("May 1, 2009 Note"), wherein Cajun, as maker of the May 1, 2009 Note, promised to pay the principal sum of $350,000.00 ("Mortgage Debt"), together with interest as set forth therein (R. p. 314) (R. p. 388) (R. p. 139, line 21–p. 140, line 2). The May 1, 2009 Note was secured by a real estate mortgage ("Quickel Mortgage") that was executed by Quickel on May 1, 2009 and recorded on May 4, 2009 in Mortgage Book 5166 at Page 2461, office of the Register of Deeds for

Horry County (R. p. 314). The Quickel Mortgage encumbered two lots (Lots 7 and 14) that were owned by Quickel (R. p. 314) (R. p. 320). Quickel also executed a personal guaranty agreement, dated May 1, 2009, whereby he agreed to be personally responsible for the Mortgage Debt owed by Cajun under the May 1, 2009 Note (R. p. 315). To further secure the loan to Cajun, Quickel, as Jenrette's attorney-in-fact, executed a real estate mortgage, dated May 1, 2009 ("Subject Mortgage"), encumbering five parcels of real property, including the Subject Real Property, owned by Jenrette (R. pp. 314-315) (R. p. 321). The Subject Mortgage was originally recorded on May 4, 2009 and re-recorded on May 5, 2009 in Mortgage Book 5166 at Page 3100 (R. p. 315).

Jenrette did not attend the closing of the loan to Cajun as the purpose of her signing the April 27, 2009 POA was to pledge her real property as collateral (R. p. 219, lines 2-13). Nothing in the April 27, 2009 POA specifically directed Quickel to procure hazard insurance (R. p. 200, lines 4-9) (R. pp. 386-387), and Quickel never obtained an insurance policy on behalf of Jenrette (R. p. 204, lines 22-24). Jenrette never executed a promissory note or a personal guaranty agreement as the Bank informed her that she did not have to make any payments or pay any money (R. p. 228, line 25-p. 229, line 3). No monies were delivered or paid to Jenrette under the May 1, 2009 Note as she did not receive any money from the Bank (R. p. 246, lines 4-6). The Bank did not create any special document for the closing of the loan to Cajun, and the Subject Mortgage was a standard mortgage used by the Bank (R. p. 147, lines 7-22). Paragraph 3 of the Subject Mortgage pertaining to insurance policies that "Borrower" may have is the language which the Bank uses in most of its mortgages (R. p. 395) (R. p. 147, lines 14-16). Paragraph 1 of the Subject Mortgage provides in pertinent part: "As further security for

all sums secured by this Mortgage, Borrower assigns to Lender all rents and profits arising from the Property" (R. p. 391). However, paragraph 3 of the Subject Mortgage fails to include any such language regarding any insurance policy or insurance proceeds serving as further security for all sums secured by the mortgage (R. p. 391) (R. p. 395). Paragraph 16 of the Subject Mortgage pertaining to the mortgagor's representations regarding hazardous substances provides in pertinent part: "The obligations and liabilities of Mortgagor under this paragraph shall survive the foreclosure of the Mortgage, the delivery of a deed in lieu of foreclosure, [and] the cancellation or release of record of this Mortgage" (R. p. 392). However, paragraph 3 of the Subject Mortgage fails to include any such language relating to any insurance policies or insurance proceeds (R. p. 391) (R. p. 395).

Cajun failed to make payments on the May 1, 2009 Note (R. p. 316), and the loan was turned over to Robert Smith, the Bank's Vice President in charge of special assets, to begin the litigation of the foreclosure of the Quickel Mortgage and the Subject Mortgage (R. p. 126, line 7-p. 127, line 16). The Bank filed a complaint in the case bearing the designation of Civil Action Number 2010-CP-26-04456 ("Prior Foreclosure") on May 19, 2010 (R. p. 313), and commenced foreclosure proceedings seeking judgment of foreclosure and sale of the parcels of real property securing the May 1, 2009 Note, including the Subject Real Property owned by Jenrette (R. p. 11). Jenrette was joined as a defendant in the Prior Foreclosure as the record owner of the Subject Real Property and as a mortgagor (R. p. 4). The Bank did not sue Jenrette for any money in the Prior Foreclosure (R. p. 242, lines 2-4). Cajun was joined as a defendant in the Prior Foreclosure as maker of the May 1, 2009 Note, and Quickel was joined as a defendant as

the owner of the two lots secured by the Quickel Mortgage and as a guarantor of the payment of the Mortgage Debt (R. p. 11) (R. pp. 314-317).

On January 15, 2011, the residence on the Subject Real Property was destroyed by fire (R. p. 11). Jenrette contacted Bradham and reported the fire casualty (R. p. 119, line 23-p.120, line 6). The Bank became aware that it was not named as a loss payee on the Insurance Policy during the pendency of the Prior Foreclosure (R. p. 11). From March of 2009 to the time of the January 15, 2011 fire casualty, Bradham did not receive any correspondence from the Bank requesting that the Bank be named as a loss payee under the Insurance Policy (R. p. 123, line 20-p. 124, line 1). The Bank did not require Jenrette to obtain casualty or liability insurance for its benefit (R. p. 267, lines 2-6), nor did the Bank contact Jenrette with regard to the Insurance Policy between the time she obtained the Insurance Policy and the time of the January 15, 2011 fire casualty (R. p. 267, lines 11-15). After the January 15, 2011 fire casualty, the Bank contacted Bradham regarding Jenrette's claim and asked that its purported interest be protected (R. p. 120, lines 7-13). Payment under the Insurance Policy was honored after Jenrette's claim was processed (R. p. 120, line 17-p.121, line 2), and the Insurer paid the sum of $105,000.00 (R. p. 246, line 25-p. 247, line 4). Due to the conflicting claims, a check was issued to both Jenrette and the Bank during the pendency of the Prior Foreclosure (R. p. 120, line 14-p. 121, line 2) (R. p. 247, lines 18-21).

A hearing in the Prior Foreclosure was held before the Master-in-Equity for Horry County on April 18, 2011 (R. p. 312), and a Master's Order of Foreclosure and Sale was filed on April 26, 2011 (R. p. 4). The Bank did not assert any cause of action against Jenrette with regard to the Insurance Proceeds in the Prior Foreclosure (R. p. 242, lines 5-

9). The Master's Order of Foreclosure and Sale did not render any findings as to Jenrette since she was not an obligor or guarantor of the Mortgage Debt (R. p. 12), but found that Cajun and Quickel were liable for the Mortgage Debt (R. p. 318). The Bank was the successful bidder after the mortgaged properties were sold at public auction on August 1, 2011 (R. p. 12). A Master's Report on Sale and Disbursements and an Order of Deficiency Judgment against Cajun and Quickel in the sum of $117,546.89 ("Deficiency Judgment") were filed on September 6, 2011. A Release of Lien Mortgage Satisfaction, dated September 2, 2011 and filed on September 8, 2011 ("Satisfaction"), released, cancelled, and satisfied the Subject Mortgage (R. p. 322) (R. p. 12).

STANDARD OF REVIEW

"An action to establish an equitable lien is an action in equity." *Chase Home Fin., LLC v. Risher*, 405 S.C. 202, 208, 746 S.E.2d 471, 474 (Ct. App. 2013). In an appeal of an '"action in equity, tried by the judge alone, without a reference, ... the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence."' *Barnes v. Johnson*, 402 S.C. 458, 466, 742 S.E.2d 6, 9 (Ct. Ap. 2013) (quoting *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)). "However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). The appellate court "will affirm the findings of the trial court in an equity case unless the appellant satisfies this court that the preponderance of the evidence is against the findings of the trial court." *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 249, 715 S.E.2d 348, 352 (Ct. App. 2011). Legal questions in

equitable cases receive review on appeal as in law. *Sloan v. Greenville Cnty.*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). "Because questions of law may be decided with no particular deference to the trial court, this court may correct errors of law in both legal and equitable actions." *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009).

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT THERE WAS A DEBT AND SPECIFIC PROPERTY TO WHICH THE DEBT ATTACHED.

The Bank claims an equitable lien on the Insurance Proceeds because it was awarded judgment of foreclosure on April 22, 2011 and a deficiency judgment against Cajun and Quickel on September 6, 2011. To prove an equitable lien as to specific property, the Bank must establish the following: (1) a debt between Jenrette and the Bank; (2) specific property to which the debt attached; and (3) an express or implied intent that the property serve as security for the payment or obligation. *First Union Commer. Corp. v. Nelson, Mullins, Riley & Scarborough*, 81 F.3d 1310, 1319 (4th Cir. 1996). "If a party seeking an equitable lien cannot satisfy any one of these requirements, this remedy is not available." *Chase Home Fin., LLC*, 405 S.C. at 209, 746 S.E.2d at 475. In the context of a contract for fire insurance "'the authorities generally agree that a contract of fire insurance is a personal contract between the insurer and insured, by which the former undertakes to indemnify the latter for the loss he sustains by fire.'" *Barnes*, 402 S.C. at 467-68, 742 S.E.2d at 10 (quoting *Steinmeyer v. Steinmeyer*, 64 S.C. 413, 420, 42 S.E. 184, 186 (1902)). A holder of a mortgage encumbering an insured property, by reason of his status as mortgagee of an insured property, has no interest in law or

equity in an insurance policy obtained by the mortgagor in his own name and for his sole benefit. *Swearingen v. Hartford Ins. Co.*, 52 S.C. 309, 315, 29 S.E. 722, 723 (1898). "If the creditors have a lien by mortgage, judgment, or execution, they can insure their own interest, but they can have no right to attach insurance money due to anyone but their own debtor." *Steinmeyer*, 64 S.C. at 421, 42 S.E. at 186. In *Steinmeyer*, the creditors of a judgment debtor commenced an action against an insured property owner to set aside the judgment debtor's conveyance to the insured on the grounds of fraud, which resulted in a decree subjecting the property to the payment of the judgment. *Id.* at 416, 42 S.E. at 184. Thereafter, the property conveyed to the insured was sold under a court order, and the sales proceeds applied to the judgment were insufficient to satisfy the judgment. *Id.* The South Carolina Supreme Court found that the insured was entitled to the insurance proceeds, and that the proceeds could not be taken by the creditors for the debt even though the property itself could be taken. *Id.* at 422, 42 S.E. at 187.

In the instant action, the Bank seeks to recover the Insurance Proceeds as a partial satisfaction of the Deficiency Judgment against Cajun and Quickel. The Insurance Proceeds were paid under an insurance policy that Jenrette purchased in her name for her sole benefit prior to the pledging of the Subject Real Property as security for a third party debt. The Bank did not request Jenrette to pay the sum of $397.00 to purchase coverage under the Insurance Policy in March of 2009 and, in fact, the Bank could not have done so as it had no insurable interest in the Subject Real Property at that time. Jenrette paid the policy premiums, including the premium to renew the Insurance Policy for the policy period of March 9, 2010 to March 9, 2011. The policy declarations pertaining to the Insurance Policy for the policy periods of March 9, 2009 to March 9, 2010 and March 9,

2010 to March 9, 2011 do not contain a mortgagee name, an address for any mortgagee, or a loan number referencing or relating to any mortgage loan. No monies were delivered or paid to Jenrette under the May 1, 2009 Note. The Bank did not sue Jenrette for any money in the Prior Foreclosure because she never executed a promissory note or a personal guaranty agreement which obligated her to pay the Mortgage Debt. The Deficiency Judgment against Cajun and Quickel in the sum of $117,546.89 was awarded to the Bank after the August 1, 2011 foreclosure sale since the Bank's bid did not yield a sum sufficient to satisfy the Mortgage Debt. The Deficiency Judgment sum owed by Cajun and Quickel represents the residue of the Mortgage Debt remaining unsatisfied after the August 1, 2011 foreclosure sale. As in *Steinmeyer*, the Subject Real Property was taken in the Prior Foreclosure by a creditor for a debt not owed by the insured.

The Insurance Proceeds cannot be taken by the Bank for the Mortgage Debt owed by Cajun and Quickel even though the Subject Real Property itself was taken. Jenrette's relationship with the Bank was limited to the capacity of a non-borrower mortgagor who pledged some of her real property as security for a loan to a third party debtor. Like the debtor's creditors in *Steinmeyer*, the Bank has no right to attach insurance money due to anyone but its own debtors, Cajun and Quickel. The preponderance of the evidence is against the trial court's finding that there was a debt and specific property to which the debt attached. Therefore, the findings of the trial court must be reversed.

II. JENRETTE WAS NOT BOUND BY A COVENANT IN THE MORTGAGE TO INSURE THE SUBJECT REAL PROPERTY AS FURTHER SECURITY FOR THE PAYMENT OF THE MORTGAGE DEBT.

A. The Provisions of Paragraph 3A of the Subject Mortgage do not establish the Requisite Intent required to impose an Equitable Lien upon the Insurance Proceeds.

The trial court found that paragraph 3A of the Subject Mortgage required the procurement of insurance proceeds and was binding on Jenrette even though the Bank failed to require an insurance policy listing it as a loss payee in its pre-loan procedures (*See* R. pp. 13-14).

"An equitable lien does not arise as a result of a mere breach of contract." *Carolina Attractions, Inc. v. Courtney*, 287 S.C. 140, 145, 337 S.E.2d 244, 247 (Ct. App. 1985). "It is hornbook law that equity will not impose an equitable lien where there is an adequate remedy at law." *Id.* at 146, 337 S.E.2d at 247. The general rule that an equitable lien may arise upon proceeds paid under an insurance policy obtained by a mortgagor in his own name where the mortgagor has covenanted to insure the mortgage property for the mortgagee's benefit is based upon an express contract by which the property owner agrees to give a lien upon the particular proceeds. *Planters' Bank v. Globe & Rutgers Fire Ins. Co.*, 156 S.C. 453, 460, 153 S.E. 385, 387 (1930) (citing *Farmers' Loan & Trust Co. v. Penn Plate Glass Co.*, 103 F. 132 (3d Cir. 1900), *aff'd*, 186 U.S. 434 (1902)). *Carrington Mortg. Servs., Inc. v. Riley*, 478 B.R. 736 (Bankr. D.S.C. 2012) provides an analysis of the three elements which the Bank must prove to establish an equitable lien. In *Carrington Mortg. Servs., Inc.*, *supra*, the mortgagor insured executed and delivered two notes and mortgages to the mortgagee. *Id.* at 739. The mortgagor failed to maintain insurance on the property as required in the mortgages.

Id. The United States Bankruptcy Court for the District of South Carolina found that the mortgagee met its burden of proof as to the first two elements because the mortgagor clearly owed a debt to the mortgagee and the debt was secured by a mortgage that required the mortgagor to maintain certain insurance coverage. *Id.* at 748. However, the mortgagee did not establish the existence of an equitable lien on the disputed insurance proceeds because it failed to meet its burden of proving the third element and did not satisfy other equitable considerations. *Id.* The court found that the mortgagee did not meet its burden of proof on the issue of the parties' intent when the evidence of intent presented by the mortgagee consisted of the mortgage language requiring insurance, the insurance policy, and the insurance check made payable to the mortgagor and mortgagee. *Id.*

In *Farmers' Loan & Trust Co.*, 186 U.S. at 444, the issue was whether an equitable lien should be imposed upon insurance monies to pay the residue of the balance remaining unsatisfied after application of the proceeds realized from the sale of the mortgaged property. The insurance policy was obtained by purchasers who took title to the mortgaged property subject to a mortgage lien. *Id.* at 444, 450. Although the facts are not analogous to the instant action, the United States Supreme Court first determined whether there was an obligation imposed by the mortgage on the mortgagor to obtain insurance. *Id.* at 449. The Court assumed that a covenant to insure on the part of the mortgagor existed under the terms of the mortgage. *Id.* at 453. The Court found that the mortgagor had no liability to pay the debt secured by the mortgage, and that the covenant to insure was of no materiality because the mortgagor was under no personal liability. *Id.* at 454, 457.

In the instant action, the Bank alleged that Jenrette, as mortgagor, defaulted under the terms of the Subject Mortgage by failing to provide an insurance policy for the Bank's benefit (*See* R. p. 53). The Bank did not allege that it had an inadequate remedy at law, but alleged that it elected to bring a successful foreclosure action resulting in the award of the Deficiency Judgment against Quickel and Cajun (*See* R. p. 53). The Bank's standard language set forth in paragraph 3A of the Subject Mortgage provides that the "Borrower" shall maintain insurance policies for the benefit of the Bank in amounts as the Bank may require, and that the form of such policy, the insurers, and the coverage provided shall be acceptable to the Bank (*See* R. p. 391; R. p. 395). However, the loan transaction was based upon the April 24, 2009 Loan Commitment which listed Cajun as the "Borrower." The Bank did not allege that it was the parties' intent, express or implied, that the Insurance Policy would serve as security for the Mortgage Debt owed by Cajun and Quickel. Quickel never obtained an insurance policy on behalf of Jenrette as the April 27, 2009 POA did not direct Quickel to obtain an insurance policy on Jenrette's behalf. The Bank did not present any evidence that it requested Jenrette to provide an insurance policy, nor did it present any evidence to show that it provided notice to Jenrette relating to any covenant or agreement pertaining to the procurement of an insurance policy. In the Prior Foreclosure, the Bank obtained judgment of foreclosure and sale of the Subject Real Property. As in the Prior Foreclosure, the Bank could have exercised the remedy available under the Subject Mortgage by commencing an action seeking judgment of foreclosure and sale of the Subject Real Property if Jenrette were to breach a covenant pertaining to the procurement of an insurance policy. However, the Bank would not have been able to obtain a money judgment against Jenrette since she

had no personal liability under the Subject Mortgage. The only evidence the Bank presented regarding the intent of Jenrette and the Bank was the language set forth in paragraph 3 of the Subject Mortgage. Jenrette's procurement of the Insurance Policy, her payment of the premiums, the policy declarations, the April 24, 2009 Loan Commitment, and the Bank's actions and omissions during the time period between the closing of the loan to Cajun and the judicial sale of the Subject Real Property do not fit squarely with the Bank's claim of an equitable lien. As in *Farmers' Loan & Trust Co.*, paragraph 3A is of no materiality because Jenrette had no personal liability under the Subject Mortgage. An equitable lien cannot arise from Jenrette's failure to procure an insurance policy for the Bank's benefit because the Bank did not allege that it had an inadequate remedy at law, and it failed to allege and present sufficient evidence to show that Jenrette and the Bank intended that Jenrette would insure the Subject Real Property as additional security for the Bank.

B. The Subject Mortgage does not require Jenrette to insure the Subject Real Property for the better Security of the Bank.

In the Trial Order, the trial court examined the Subject Mortgage and found that Jenrette was obligated under paragraph 3A to insure the Subject Real Property for the better security of the Bank (*See* R. p. 15). In support of its finding, the trial court reiterated the holding in *Blackwell v. State Farm Mutual Automobile Ins. Co.*, 237 S.C. 649, 118 S.E.2d 701 (1961) "that if a mortgagor is bound by a covenant in the mortgage to insure the mortgaged premises for the better security of the mortgagee, the mortgagee has an equitable lien on the money due on the policy taken out by the mortgagor, to the extent of the mortgagee's interest in the property is damaged or destroyed" (R. pp. 14-

15). In *Blackwell*, the insured purchased an automobile and borrowed a sum to pay the unpaid portion of the purchase price and the insurance premium. *Blackwell*, 237 S.C. at 650, 118 S.E.2d at 702. The loan was evidenced by a note that was secured by a chattel mortgage on an automobile. *Id.* at 651, 118 S.E.2d at 702. The bank immediately applied to the insurer for automobile coverage and paid the premium at the time the loan was made. *Id.* at 651, 118 S.E.2d at 703. An equitable lien in favor of the bank was imposed upon the insurance proceeds to the extent of the chattel mortgage debt. *Id.* at 653, 118 S.E.2d at 704.

"A mere intention to take additional security does not create a lien." *Perpetual Federal S & L Ass'n v. Willingham*, 296 S.C. 24, 27, 370 S.E.2d 286, 288 (Ct. App. 1988). "Where the agreement in question is a written contract, the intention of the parties must be inferred from the contents of the whole agreement and not from any one of its several parts." *Harmon v. Bank of Danville*, 287 S.C. 449, 453, 339 S.E.2d 150, 153 (Ct. App. 1985). The general rule that an equitable lien may arise upon proceeds paid under an insurance policy obtained by a mortgagor in his own name where the mortgagor has covenanted to insure the mortgaged property for the mortgagee's benefit is based upon an express contract by which the property owner agrees to give a lien upon the particular proceeds. *Planters' Bank*, 156 at 460, 153 S.E. at 387.

In the instant action, Jenrette obtained the Insurance Policy and paid the premium prior to the execution of the April 27, 2009 POA, the execution and recordation of the Subject Mortgage, and the closing of the loan to Cajun. *Blackwell* is distinguishable from the instant action from a factual basis as *Blackwell* involved a chattel mortgage and the loss of an automobile. Unlike the insured in *Blackwell*, Jenrette was not obligated to pay

the Mortgage Debt as she did not borrow any sums of money from the Bank, she was not a party to the May 1, 2009 Note, and the Bank did not pay the premium to obtain coverage. At trial, there was no evidence introduced that could reasonably support a factual finding that the Bank required or requested Jenrette to obtain an insurance policy naming it as an additional insured or loss payee. The record is clear that the Bank neither contacted Jenrette nor the Insurer regarding insurance coverage, the Insurance Policy, or the Insurance Proceeds prior to the January 15, 2011 fire casualty. However, the Bank was in possession of the Insurer's contact information and the policy number pertaining to the Insurance Policy on May 1, 2009 (*See* R. p. 424).

Paragraph 3A of the Subject Mortgage provides in pertinent part:

> Borrower shall at its sole expense obtain for, deliver to, and maintain for the benefit of Lender, during the life of the Mortgage, Insurance policies in such amounts as Lender may require, in no event less than the full insurable value, insuring the Property against fire, extended coverage and such other insurable hazards, casualties and contingencies as Lender may require including flood damage, and shall pay promptly, when due, any premiums on such insurance policies and on any renewals thereof.

Paragraph 1 of the Subject Mortgage provides in pertinent part that: "As further security for all sums secured by this Mortgage, Borrower assigns to Lender all rents and profits arising from the Property" (*See* R. p. 391). However, Paragraph 3 of the Subject Mortgage does not provide that any insurance policy or insurance proceeds shall, may, or will serve as security for any sums secured by the mortgage (*See* R. p. 391; R. p. 395). Rather than using its standard mortgage to secure a loan in a transaction where the mortgagor has no personal liability under a mortgage, the Bank could have incorporated language into paragraph 3A of the Subject Mortgage to provide that Jenrette covenanted to insure the Subject Real Property as additional security for the Bank. Based upon the

provisions of the Subject Mortgage and the evidence introduced at trial, there is no covenant in the Subject Mortgage obligating Jenrette to insure the Subject Real Property for the better security of the Bank. Therefore, the trial court's finding that Jenrette was obligated under paragraph 3A to insure the Subject Real Property for the better security of the Bank is against the preponderance of the evidence and must be reversed.

C. The Subject Mortgage's reference to Jenrette as "Borrower" does not give rise to an Equitable Lien in favor of the Bank.

The trial court found that Jenrette was the "Borrower" as that term is defined in the Subject Mortgage (R. p. 13), and that Jenrette, as "Borrower", made the assignment contained in paragraph 3B of the Subject Mortgage (R. p. 14). However, the trial court also found that Jenrette was joined as a defendant in the Prior Foreclosure as the record owner of the Subject Real Property and as a mortgagor.

"Where the agreement in question is a written contract, the intention of the parties must be inferred from the contents of the whole agreement and not from any one of its several parts." *Harmon*, 287 S.C. at 453, 339 S.E.2d at 153. "'A court of equity may not add or substitute other parties for those appearing on the face of a contract where the effect may be to make a new contract.'" *Independence National Bank v. Buncombe Professional Park, LLC*, 402 S.C. 514, 521, 741 S.E.2d 572, 576 (Ct. App. 2013) (quoting 66 Am. Jur. 2d *Reformation of Instruments* § 51 (2011)). "To give effect to the parties' intentions, the court will endeavor to determine the situation of the parties and their purposes at the time the contract was entered." *Bell*, 385 S.C. at 374, 684 S.E.2d at 205. The term borrower is defined as "a person or entity to whom money or something else is lent." *Black's Law Dictionary* (7th ed. 1999). A mortgage represents a security

instrument for a debt or obligation, but not the full payment thereof. *Perpetual Bldg. & Loan Ass'n of Anderson v. Braun*, 270 S.C. 338, 340, 242 S.E.2d 407, 408 (1978). In *Farmers' Loan & Trust Co.*, 186 U.S. at 453, the United States Supreme Court assumed that a covenant to insure on the part of the mortgagor existed under the terms of the mortgage. However, the Court found that the mortgagor had no liability to pay the debt secured by the mortgage, and that the covenant to insure was of no materiality because the mortgagor was under no personal liability. *Id.* at 454, 457.

In the instant action, the Bank alleged that Jenrette was the mortgagor under the Subject Mortgage's contract terms, and that she defaulted on her obligations under the mortgage by failing to provide an insurance policy for the Bank's benefit. At trial, the Bank asserted that an equitable lien arose as a result of the April 24, 2009 Loan Commitment and the Cajun Agreement to Provide Insurance. However, Quickel did not sign the April 24, 2009 Loan Commitment and the Cajun Agreement to Provide Insurance as Jenrette's attorney-in-fact. The Bank did not create any special document for the closing of the loan to Cajun as the Subject Mortgage was a standard mortgage used by the Bank. Quickel executed the Subject Mortgage as Jenrette's attorney-in-fact pursuant to the April 27, 2009 POA. The purpose of Jenrette signing the April 27, 2009 POA was to pledge some of her real property as collateral. The Bank's standard language contained in the Subject Mortgage listed Jenrette as "Mortgagor," but also referenced her as "Borrower" even though she was not obligated to pay the Mortgage Debt. The Bank's standard language contained in paragraphs 15 and 16 of the Subject Mortgage pertain to covenants and representations of a "Mortgagor" rather than a "Borrower." Pursuant to paragraph 8 of the Subject Mortgage, a default under the terms

therein will occur upon the failure of the "Borrower" to pay any sum secured by the mortgage when due. Conceptually, a literal interpretation of paragraph 8, without considering the other provisions in the Subject Mortgage, the May 1, 2009 Note, and the situation of the parties at the time of the closing of the loan to Cajun, could indicate that Jenrette was obligated as "Borrower" to pay the Mortgage Debt. Such an interpretation would make a new agreement between Jenrette and the Bank because the interpretation substitutes Jenrette for the actual borrower, Cajun. This could not have been the intention of the parties because no documents were executed which obligated Jenrette to pay the Mortgage Debt, and no monies were delivered or paid to Jenrette under the May 1, 2009 Note. The loan transaction was based upon the April 24, 2009 Loan Commitment which listed Cajun as "Borrower." As in *Farmers' Loan & Trust Co.*, the Subject Mortgage's reference of Jenrette as "Borrower" is of no materiality because she had no obligation to pay the Mortgage Debt. Therefore, the trial court's finding that Jenrette, as the "Borrower," made the assignment contained in paragraph 3B of the Subject Mortgage is against the preponderance of the evidence and must be reversed.

III. THE ASSIGNMENT PROVISION IN THE SUBJECT MORTGAGE DOES NOT IMPOSE AN EQUITABLE LIEN UPON THE INSURANCE PROCEEDS.

A. The Preponderance of the Evidence is against the Trial Court's finding that the Assignment was to provide Additional Security for the Mortgage Debt.

The Trial Order found that Jenrette, as "Borrower" under the Subject Mortgage, made the assignment contained in paragraph 3B of the mortgage (*See* R. p. 14), and that it made no difference that the Bank's pre-loan dealings with Quickel were less than thorough with regard to setting forth any insurance requirements since Quickel was authorized to execute the Subject Mortgage in Jenrette's name under the April 27, 2009

POA (*See* R. p. 14). The trial court found that the assignment of the Insurance Proceeds was valid regardless of whether Jenrette was obligated under the May 1, 2009 Note because the purpose of the assignment, in the trial court's view, was to provide additional security for the Mortgage Debt (*See* R. p. 18).

"A mere intention to take additional security does not create a lien." *Willingham*, 296 S.C. at 27, 370 S.E.2d at 288. A covenant to assign rents and profits does not create an equitable lien as it confers no interest in the property itself. *Id.* "Where the agreement in question is a written contract, the intention of the parties must be inferred from the contents of the whole agreement and not from any one of its several parts." *Harmon*, 287 S.C. at 453, 339 S.E.2d at 153. The general rule that an equitable lien may arise upon proceeds paid under an insurance policy obtained by a mortgagor in his own name where the mortgagor has covenanted to insure the mortgage property for the mortgagee's benefit is based upon an express contract by which the property owner agrees to give a lien upon the particular proceeds. *Planters' Bank*, 156 S.C. at 460, 153 S.E. at 387. In *Carrington Mortg. Servs., Inc.*, 478 B.R. at 748, the United States Bankruptcy Court for the District of South Carolina found that the mortgagee did not meet its burden of proof on the issue of the parties' intent when the evidence of intent presented by the mortgagee consisted of the mortgage language requiring insurance, the insurance policy, and the insurance check made payable to the mortgagor and mortgagee.

In the instant action, the only evidence the Bank presented regarding the intent of Jenrette and the Bank was the language set forth in paragraph 3 of the Subject Mortgage. The Bank did not allege that it was the parties' intent, express or implied, that the Insurance Proceeds from the Insurance Policy obtained by Jenrette would serve as

additional security for the Mortgage Debt owed by Cajun and Quickel. The loan to Cajun was based upon the April 24, 2009 Loan Commitment which listed Cajun as "Borrower." Paragraph 1 of the Subject Mortgage provides in pertinent part that: "As further security for all sums secured by this Mortgage, Borrower assigns to Lender all rents and profits arising from the Property" (R. p. 391). However, paragraph 3B of the Subject Mortgage does not provide that any insurance proceeds shall, may, or will serve as security for any sum secured by the mortgage (*See* R. p. 391; R. p. 395). The record is clear that the Bank neither contacted Jenrette nor the Insurer regarding insurance coverage, the Insurance Policy, or the Insurance Proceeds prior to the January 15, 2011 fire casualty. The Insurance Proceeds were paid by the Insurer under a check made payable to both Jenrette and the Bank despite the language set forth in paragraph 3B of the Subject Mortgage, and no evidence was introduced at trial to show that the Bank disputed the manner in which the check was issued by the Insurer. Paragraph 3B of the Subject Mortgage would include language similar to the provision set forth in paragraph 1 of the mortgage if the intent of the purported assignment was to provide additional security for the Mortgage Debt. Therefore, the trial court's finding that the purpose of the assignment was to provide additional security for the Mortgage Debt is against the preponderance of the evidence and must be reversed.

B. The Purported Assignment in the Subject Mortgage does not Survive Cancellation under the Facts of this Case.

The trial court concluded that the assignment in the Subject Mortgage survived its cancellation and bound Jenrette even though the Trial Order found that the Subject Mortgage was satisfied and cancelled when the foreclosure sale was finalized (R. p. 12).

In support of its conclusion, the trial court relied upon the rules and decisions espoused in The Restatement (Third) of Property, §4.8; *Jones v. Equicredit Corp. of South Carolina*, 347 S.C. 535, 556 S.E.2d 713 (Ct. App. 2001); *Emmons v. Lake States Ins. Co.*, 193 Mich. App. 460, 484 N.W.2d 712 (Mich. App. 1992); *Certain Underwriters of Lloyds v. U.S. Industrial Services, LLC*, 825 F. Supp. 2d 882 (E.D. Michigan 2011); *State Farm Life Ins. Co. v. P.M.C.*, Slip Copy 2013 W.L. 4009031 (U.S. District Court, Eastern District of Michigan); *Whitestone S & L Ass'n v. Allstate*, 28 N.Y.2d 332, 270 N.E.2d 694 (1971); *Smith v. Gen. Mortgage Corp.*, 402 Mich. 125, 261 N.W.2d 710 (1978); *Nationwide v. Wilborn*, 291 Ala. 193, 279 So.2d 460 (1973); *Allstate v. James*, 779 F.2d 1536 (11th Cir. 1986); *Helmer v. Texas Farmers Ins. Co.*, 632 S.W.2d 194 (Tex. App. 1982). However, none of the above-referenced authority involved or discussed a case or fact pattern wherein the mortgagor was not liable for the payment of the indebtedness secured by the mortgage.

In support of its finding that the assignment in the Subject Mortgage survived the Satisfaction, the trial court reiterated the holding in *Jones v. Equicredit Corp. of South Carolina*, *supra*, that "when the foreclosure sale does not satisfy the mortgage indebtedness, the mortgagee is entitled to collect insurance proceeds if the unpaid amount of the mortgage is in excess of the insurance proceeds" (R. p. 15). The trial court found that the holding of *Certain Underwriters of Lloyds v. U.S. Industrial Services, LLC*, *supra*, was in accord with the South Carolina Court of Appeals' conclusion in *Jones v. Equicredit Corp. of South Carolina* (R. p. 17). The trial court reiterated the holding in *Certain Underwriters of Lloyds,* "that because the foreclosure sale did not provide full satisfaction of the debt, the assignment in the mortgage survived the sale and the lender

therefore had a right to the insurance proceeds" (R. p. 17). In *Jones*, the plaintiff mortgagor borrowed the sum of $14,981.52 that was secured by a second mortgage on her property, and her note and mortgage were assigned to Fannie Mae. *Jones*, 347 S.C. at 538, 556 S.E.2d at 714. The defendant who claimed entitlement to the disputed insurance proceeds was the servicer of the loan under a contract between Fannie Mae and the defendant's predecessor in interest. *Id.* Two of the policy endorsements to the policy listed the defendant as the named insured and referenced the plaintiff mortgagor as borrower and an additional insured. *Id.* at 541, 556 S.E.2d at 716. The declarations page listed the plaintiff mortgagor as the insured and the defendant as a mortgagee. *Id.* at 541-42, 556 S.E.2d at 716. The policy expressly limited the plaintiff mortgagor's "right to recover to 'residual amounts of insurance over and above' ... [the defendant's] 'insurable interest.'" *Id.* at 542, 556 S.E.2d at 716. The plaintiff mortgagor claimed that the defendant did not have an insurable interest in the property after the foreclosure sale. *Id.* at 540, 556 S.E.2d at 715. In considering whether the defendant held an insurable interest, the court distinguished the insurable interest of a servicing agent from the interest of a mortgagee. *Id.* at 542, 556 S.E.2d at 717. The court found that the defendant's "insurable interest is based on its potential liability under the servicing agreement, and would not be extinguished even if the mortgage indebtedness is satisfied." *Id.* at 543, 556 S.E.2d at 717. *Certain Underwriters of Lloyds, supra*, involved a dispute between the United States claiming entitlement to insurance proceeds under a tax lien and a mortgagee claiming entitlement to the proceeds under a mortgage and an insurance policy. 825 F. Supp. 2d at 884. On January 27, 2006, the mortgagor in *Certain Underwriters of Lloyds* acquired a commercial property and granted a

$315,000.00 mortgage as security for a loan. *Id.* Three years after the issuance of the mortgage loan, the mortgagor obtained an insurance policy which named the mortgagee as a loss payee. *Id.* The insurance policy provided that the mortgagor would pay the remaining debt to the insurer if the insurer paid the principal on the debt plus accrued interest to the loss payee. *Id.* at 885. After the loan went into default, the mortgagee foreclosed on the mortgage and purchased the property for a sum that was less than the outstanding amount owed on the mortgage loan. *Id.* The property incurred water damage after it was conveyed to Fannie Mae. *Id.* The court found that without the conveyance to Fannie Mae, the mortgagee would have been entitled to the insurance proceeds under both the insurance policy and the mortgage. *Id.* at 892. The court also found that the mortgage assigned the mortgagee the right to the insurance proceeds to act as collateral security for the debt. *Id.* at 891. In reaching its conclusion as to the assignment in the mortgage, the court does not analyze or make any findings pertaining to the interpretation or intention of the mortgage provisions. *Id.* at 889-90. Instead, the opinion merely states that "the mortgage contained an assignment of certain rights to the mortgagee, including certain rights to insurance proceeds." *Id.* at 889. The opinion indicates that the United States did not dispute the mortgagee's contention that the mortgage "explicitly states that in the event of a foreclosure, the mortgagor's right to insurance proceeds are assigned to the mortgagee." *Id.* at 890.

Jones, supra, is distinguishable from the instant action from a factual basis as that case did not involve a claim of an equitable lien upon proceeds paid under an insurance policy that was procured by a non-borrower mortgagor. Unlike the instant action, *Jones* involved a dispute between a mortgagor who was the maker of promissory note secured

by a mortgage and a loan servicer who was named as a mortgagee on an insurance policy and listed as the named insured on two endorsements to the policy. The plaintiff mortgagor in *Jones* was referenced as a borrower and as an additional insured under the policy endorsements, and would have been personally liable for the residue of the indebtedness remaining unsatisfied after the foreclosure sale without a waiver of deficiency. *Certain Underwriters of Lloyds, supra*, is distinguishable from the instant action from a factual basis as that case involved a dispute between a holder of a tax lien and a mortgagee that was named as a loss payee under an insurance policy. Unlike the mortgagors in *Jones* and *Certain Underwriters of Lloyds*, Jenrette was not the borrower of the sums partially secured by the Subject Mortgage. The loan transaction in the instant action was based upon the April 24, 2009 Loan Commitment which listed Cajun as "Borrower." Paragraph 16 of the Subject Mortgage pertaining to the mortgagor's representations regarding hazardous substances provides in pertinent part: "The obligations and liabilities of Mortgagor under this paragraph shall survive the foreclosure of the Mortgage, the delivery of a deed in lieu of foreclosure, the cancellation or release of record of this Mortgage" (*See* R. p. 392). However, paragraph 3 of the Subject Mortgage pertaining to insurance policies that "Borrower" may have omits any such language relating to any insurance policies or insurance proceeds. Unlike the mortgage discussed in *Certain Underwriters of Lloyds, supra*, paragraph 3 of the Subject Mortgage does not explicitly state or even provide that the mortgagor's right to insurance proceeds is assigned to the mortgagee in the event of a foreclosure.

"A mortgage and a note are separate securities for the same debt, and a mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on

the note or to pursue a foreclosure action." *Bell*, 385 S.C. at 374, 684 S.E.2d at 204. A mortgage represents a security instrument for a debt or obligation, but not the full payment thereof. *Braun*, 270 S.C. at 340, 242 S.E.2d at 408. In *Farmers' Loan & Trust Co.*, 186 U.S. at 444, the United States Supreme Court determined whether an equitable lien should be imposed upon insurance proceeds to pay the residue remaining unsatisfied after the sale of a property. The Court found that the mortgagor had no liability to pay the debt secured by the mortgage, and that the covenant to insure was of no materiality because the mortgagor was under no personal liability. *Id.*

The Bank could not bring an action seeking judgment against Jenrette for the Mortgage Debt regardless of whether it elected to bring an action solely on the May 1, 2009 Note, solely on the Subject Mortgage, or on both the May 1, 2009 Note and the Subject Mortgage. The loan to Cajun was based upon the April 24, 2009 Loan Commitment which listed Cajun as "Borrower." The Subject Mortgage does not represent the full payment of the Mortgage Debt because the Mortgage Debt is the sum borrowed by Cajun, and the Subject Mortgage is the security instrument for the Mortgage Debt. Paragraph 3 of the Subject Mortgage would contain language similar to paragraph 16 if the parties intended the purported assignment provision to survive cancellation of the Subject Mortgage. Further, any purported assignment or covenant pertaining to insurance proceeds is of no materiality because Jenrette, like the mortgagor in *Farmers' Loan & Trust Co.*, was not obligated to pay the Mortgage Debt and had no personal liability under the Subject Mortgage.

C. The Trial Court erred in finding that the Assignment in the Subject Mortgage bound Jenrette because a Judgment issued by a Court Constitutes a Final Determination of the Rights of the Parties in a Specific Proceeding.

A judgment issued by a court constitutes a final determination of the rights of the parties in a specific proceeding. *Moore v. Holland*, 16 S.C. 15, 27 (1881). "The courts can enforce legal contracts of parties, as made, up to the time of the judgment, but, when the judgment is pronounced, the rights of the parties are determined up to that moment, and then the judgment must be enforced according to the law applicable to judgments." *Moore*, 16 S.C. at 28. "A judgment is the final determination of the rights of the parties in the action, and is conclusive of all matter necessarily involved, whether raised or not, especially if the party denying the adjudication knew of the matter and could have interposed it at the previous trial, either in support of a claim or as a defense." *Ryan v. The Southern B. & L. Ass'n*, 50 S.C. 185, 188, 27 S.E. 618, 619 (1897).

In the instant action, the Bank became aware that it was not named as a loss payee on the Insurance Policy during the pendency of the Prior Foreclosure. A check for the Insurance Proceeds was issued to both Jenrette and the Bank during the pendency of the Prior Foreclosure, but the Bank did not assert any cause of action against Jenrette with regard to the Insurance Proceeds. The Master's Order of Foreclosure and Sale of April 26, 2011 found that Cajun and Quickel were liable for the Mortgage Debt, but did not render any findings as to Jenrette since she was not an obligor or guarantor of the Mortgage Debt. The Deficiency Judgment against Cajun and Quickel was awarded to the Bank after the Subject Real Property was sold at public auction on August 1, 2011. The Bank elected to proceed with judgment of foreclosure and sale, judicial sale, and entry of the Deficiency Judgment in the sum of $117,546.89 without raising any issue with regard

to the Insurance Proceeds. Therefore, any rights and obligations of Jenrette and the Bank under the Subject Mortgage merged into the Master's Order of Foreclosure and Sale such that the rights and obligations of Jenrette and the Bank under the Subject Mortgage were extinguished.

D. The Trial Court erred in determining that Jenrette's reliance upon the Deficiency Statute was misplaced.

The trial court held that the Bank was entitled to the entire sum of the Insurance Proceeds since the bid submitted by the Bank at the August 1, 2011 foreclosure sale was less than the amount due on the Mortgage Debt (R. p. 18). However, the trial court determined that Jenrette's reliance upon S.C. Code Section 29-3-660 ("Deficiency Statute") was misplaced since the Bank was not seeking a deficiency judgment against her (R. p. 19).

South Carolina courts have found "that if the mortgaged premises are sold under a foreclosure decree and fail to bring a sufficient amount to satisfy the debt, the mortgagee is entitled, absent any statutory limitation or waiver on his part, to a personal judgment for the remaining deficiency." *Braun*, 270 S.C. at 340, 242 S.E.2d at 408. "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 38, 508 S.E.2d 16, 18 (1998). "The right to a deficiency judgment is provided by statute," *American Gen. Fin. Servs. v. Brown*, 376 S.C. 580, 583, 658 S.E.2d 99, 100 (2008), and permits a court in a mortgage foreclosure action to issue a deficiency judgment for the residue of the mortgage debt remaining unsatisfied after judicial sale in cases in which a mortgagor

or other person is personally liable for the mortgage debt. S.C. Code Ann. § 29-3-660 (2013). After a property is sold "pursuant to a decree of foreclosure, the officer of the court making the sale shall cause to be recorded in the office where the foreclosed mortgage is recorded a release, cancellation, and satisfaction of the lien." S.C. Code Ann. § 29-3-780 (2013). However, the recordation of the release, cancellation, and satisfaction does not satisfy the unpaid portion of the debt secured by the mortgage. *Id.*

In the instant action, the Bank claimed that it was entitled to the Insurance Proceeds since the Bank's successful bid at the August 1, 2011 foreclosure sale yielded a sum less than the Mortgage Debt, and the Deficiency Judgment was greater than the sum of the Insurance Proceeds on deposit (*See* R. p. 12). The Bank asserted an equitable lien on the Insurance Proceeds to partially satisfy the indebtedness owed by Cajun and Quickel under the Deficiency Judgment. The Deficiency Judgment against Cajun and Quickel in the sum of $117,546.89 became the unpaid portion of the Mortgage Debt when it was filed on September 6, 2011. Following the entry of the Master's Order of Foreclosure and Sale and the August 1, 2011 foreclosure sale, the Bank's remedy to satisfy the unpaid portion of the Mortgage Debt is codified by the Deficiency Statute and is limited to the execution and enforcement of the Deficiency Judgment against the judgment debtors, Cajun and Quickel. S.C. Code Section 29-3-780 is clear that the filing of the Satisfaction does not satisfy the unpaid portion of the Mortgage Debt owed by Cajun and Quickel. However, Jenrette was not personally liable for the Mortgage Debt under the Subject Mortgage, the Master's Order of Foreclosure and Sale, or the Deficiency Judgment. The plain and unambiguous language of the Deficiency Statute and S.C. Code Section 29-3-780 do not permit the Bank to execute or impose an

equitable lien on the assets of a non-debtor mortgagor to satisfy a deficiency judgment awarded against another party.

Under the trial court's holding, the provisions of the Subject Mortgage survived the recordation of the Satisfaction and required the Insurance Proceeds belonging to Jenrette to be paid to the Bank as partial satisfaction of the $117,546.89 deficiency sum owed by Cajun and Quickel. The trial court's holding permitted the Bank to execute on the Deficiency Judgment and obtain an asset of Jenrette even though she was not a judgment debtor. Jenrette relied on the Deficiency Statute to show that construction of S.C. Code Section 29-3-780 with respect to the unpaid portion of the Mortgage Debt is intended to apply to deficiency judgments awarded under the Deficiency Statute. Therefore, Jenrette's reliance on the Deficiency Statute is not misplaced as it must be considered when determining whether the provisions in the Subject Mortgage survived recordation of the Satisfaction, and whether the Bank can impose an equitable lien on Insurance Proceeds belonging to a non-borrower mortgagor to satisfy an indebtedness owed by another party under a deficiency judgment.

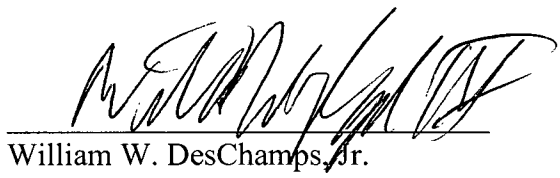
CONCLUSION

Equity does not permit the Bank to attach insurance money due to anyone but its own debtors, Cajun and Quickel. The rights and obligations of the Appellant and the Respondent under the Subject Mortgage were extinguished in the Prior Foreclosure, and the plain and unambiguous language of the Deficiency Statute does not permit the Respondent to impose an equitable lien on insurance proceeds paid under an insurance policy obtained by a non-borrower mortgagor in her own name for her sole benefit. The

decision of the trial court must be reversed because its finding of an equitable lien in favor of the Respondent is against the preponderance of the evidence.

December 10, 2014

Respectfully submitted,



William W. DesChamps, Jr.
William W. DesChamps, III
DesChamps Law Firm
1357 21st Avenue North, Suite 102
Myrtle Beach, South Carolina 29577
(843) 448-2391
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Appellate Case No. 2014-001285

National Security Fire and Casualty Company, Plaintiff,

v.

Rosemary Jenrette, AKA Rosemary Long Jenrette and Horry County State Bank, Defendants,

Of whom

Rosemary Jenrette, AKA Rosemary Long Jenrette is the Appellant,

and

Horry County State Bank is the Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Amended Final Brief complies with Rule 211(b), SCACR.

December 10, 2014

William W. DesChamps, III
William W. DesChamps, Jr.
1357 21st Avenue North, Ste. 102
Myrtle Beach, SC 29577
(843) 448-2391
Attorneys for Appellant