THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Special Referee

Case No. 2011-CP-30-00583

Certus Bank, N.A. ..... Appellant,

v.

Kenneth E. Bennett, Twin Rivers Resort, LLC and
Bennett of Greenwood, LLC ..... Defendants.

Of which Twin Rivers Resort, LLC, is the ..... Respondent.

Appellate Case No. 2014-001248

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant Certus Bank, N.A., ("Certus") filed its Complaint on June 16, 2011 (R. p. 4, Complaint) and named Kenneth E. Bennett, Twin Rivers Resort, LLC ("TRR") and Bennett of Greenwood, LLC ("BOG") as defendants. Certus brought three causes of action against all three defendants: ratification, equitable lien and mortgage reformation. TRR, the Respondent in this appeal, filed its Answer on August 22, 2011. (R. p. 24, Answer of Twin Rivers Resort, LLC).[1] Certus obtained a judgment on Kenneth E. Bennett on September 29, 2011.

On February 25, 2014, TRR moved for summary judgment as to all causes of action. (R. p. 57, Motion for Summary Judgment of TRR and Memorandum in Support). Certus filed its Memorandum in Opposition on April 8, 2014. The Special Referee on April 14, 2014 granted summary judgment as to the ratification cause of action, but denied summary judgment as to the remaining causes of action. (R. p. 1, Order granting Partial Summary Judgment). Certus moved to alter or amend judgment on April 28, 2014, R. p. 246, Motion to Alter or Amend). The Special Referee denied the motion on May 12, 2014. (R. p. 3, Order Denying Motion to Alter or Amend.).

[1] TRR, LLC includes a number of business interests owned by Richard C. "Rick" Bennett. Twin Rivers Resort is a business currently owned by TRR.

STATEMENT OF FACTS

This is a case in which Certus Bank, successor in interest to now-defunct CommunitySouth Bank, seeks to obtain a judgment on a mortgage against Twin Rivers Resort, LLC ("TRR"), even though TRR did not exist at the time of the formation of the mortgage and even though TRR's acquisition of the subject property occurred three years after the 2007 mortgage.

Defendant Kenneth E. (Ken) Bennett, obtained a loan from CommunitySouth on November 1, 2007. CommunitySouth named Ken Bennett as the mortgagor on the property used to secure the loan, even though the property did not belong to Ken Bennett, but instead to JKR, LLC, an entity owned by Ken Bennett and two other members. This transaction was a refinance transaction, meaning CommunitySouth knew, or was in a position to know, that the secured property did not belong to Ken Bennett individually.

On November 1, 2007, Kenneth E. Bennett ("Ken Bennett") borrowed $497,450 from CommunitySouth Bank pursuant to a Promissory Note ("Loan"). (R. p. 254, Tr. p. 3: 18-19). Ken Bennett was one of three members of JKR, LLC. (R. p. 253, Tr. p. 2: 32-34). Ken Bennett is the brother of Richard C. ("Rick") Bennett, who is the sole member of TRR. (R. p. 253, p. 2: 24- 3: 1).[2]

Ken Bennett received the Loan proceeds. (R. p. 803, Plaintiff's Responses to Defendant Twin Rivers' First Requests for Admission No. 10). Neither Certus nor its predecessor CommunitySouth advanced any funds to TRR. (R. p. 282, Tr. p. 31: 14-19, trial court notes that TRR is twice removed from the original obligor and that the note and mortgage were signed before TRR was ever formed).

[2] Note that Richard K. Bennett is a member of JKR (R. p. 253, Tr. P. 2: 22-24), but not Richard C. Bennett.

At the time of the Loan closing on November 1, 2007, Ken Bennett also executed a first mortgage ("Mortgage") in favor of CommunitySouth as security for the Loan. (R. p. 803, Plaintiff's Responses to Defendant Twin Rivers' First Requests for Admission No. 3). The Mortgage was recorded on December 10, 2007 with the Laurens County Clerk of Court in Mortgage Book 1727 at Page 19. (R. p. 821, November 1, 2007 CommunitySouth mortgage). The mortgage secured property located at Twin River Road and 1879 Dillard Road, Waterloo, Laurens County and at 130 Squirrel Drive, Waterloo, Laurens County. As stated previously, this property did not belong to Ken Bennett individually, but rather to JKR, LLC.

Attorney James S. Belk closed the Loan to Ken Bennett.(R. p. 886, HUD Settlement Statement on CommunitySouth Bank November 1, 2007 loan). The Settlement Statement for the November 1, 2007 Loan shows that no funds from the Loan were paid to JKR, TRR or Rick Bennett. (R. p. 886, HUD Settlement Statement November 1, 2007 loan). In his affidavit dated April 14, 2014, seven years after the November 1, 2007 closing, Belk stated that it was the intent of Kenneth Bennett and CommunitySouth to put a first mortgage on the subject property and the fact that Ken Bennett and not JKR was named on the mortgage was due to "oversight, inadvertence, or scrivener's error." (R. p. 810, affidavit of James S. Belk, paragraphs 9 and 10). Neither CommunitySouth nor its successor Certus ever brought a malpractice suit against Belk. It should be noted that Belk never referenced TRR or Richard C. "Rick" Bennett in his affidavit as being party to the November 1, 2007 closing.

Belk also wrote a title policy with Commonwealth Land Title Insurance Company in favor of CommunitySouth insuring the Mortgage. (R. p. 98, Exhibit C, TRR

Memorandum in Support of Motion for Summary Judgment). Neither Belk or CommunitySouth ever discovered that Ken Bennett never held title to the property he mortgaged even though both attorney and bank were in a position to do so through a title search. At closing and at the time the property was mortgaged, title to the property was vested in JKR Development, LLC ("JKR") of which Ken Bennett was a member, but not Richard C. "Rick" Bennett. (R. p. 812, Deed from JKR, LLC to Bennett of Greenwood). On or around February 22, 2008, JKR transferred the property to Bennett of Greenwood, ("BOG") of which Ken Bennett is the sole member. (R. p. 812, Deed from JKR to BOG). TRR did not receive the property until BOG transferred it on or about September 14, 2010. (R. p. 876, Deed from BOG to TRR).

Around March 2010, Ken Bennett sought his brother Rick Bennett's assistance with his financial obligations to CommunitySouth, which included several loans, including a $50,000 line of credit. (R. p. 301, Deposition of Kenneth Bennett, p. 13: l. 2-9). Rick Bennett signed a commitment letter to CommunitySouth, but an agreement was never finalized because CommunitySouth insisted on a cross-default provision. (R. p. 675, Deposition of Richard C. Bennett, p. 27: 3-28).

On or around October, 2010, Ken Bennett defaulted on the Loan. On January 21, 2011, the South Carolina State Board of Financial Institutions closed CommunitySouth and named the Federal Deposit Insurance Corporation ("FDIC") as Receiver. On that same date, Certus succeeded CommunitySouth pursuant to a Purchase and Assumption Agreement with the FDIC. (R. pgs. 536-648, Certus 30(b)(6) Dep. , Δ's Ex. 3).

On February 18, 2011, Certus made a written claim against Commonwealth on the insured mortgage. (R., p. 145, TRR's Memorandum in Support for Summary Judgment Exhibit "F"). Certus has not sued Commonwealth on the title policy.

On September 29, 2011, Certus obtained a default judgment against Ken Bennett for $510,400.15 (R. p. 445, Certus 30(b)(6) Dep., p. 8) (R. p. 807, Plaintiff's Responses to Defendant Twin Rivers' Second Requests for Admission No. 3).

Certus charged off the Loan in December 2012. (R. p. 447, Certus 30(b)(6) Dep. p. 10: 4-6). Certus acquired the Loan at its book value of $386,400. Certus has been reimbursed sixty-nine percent of the loan or approximately $266,616.00 by the FDIC under its Loss Sharing Agreement, making Certus's actual loss to be no more than $119,784.00. (R. p. 454, Certus 30(b)(6) Dep. p. 17). Nevertheless, Certus continues to press its suit against TRR, even though TRR was not a party to the November 1, 2007 loan proceedings.

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Laurens Emergency Med. Specialist v. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003).

The trial court should grant summary judgment against a party who fails to make a showing sufficient to establish the existence of an essential element of the party's case. *Shupe v. Settle*, 315 S.C. 510, 516, 445 S.E.2d 651, 655 (Ct. App. 1994).

Where the record is devoid of any allegation or evidence tending to show there is a material fact in issue, the moving party is entitled to summary judgment as a matter of law. *Milligan v. Liberty Life Ins. Co.*, 313 S.C. 478, 481 443 S.E.2d 381, 382 (1994).

While courts are bound to review the record in a light most favorable to the nonmoving party, a court cannot ignore facts unfavorable to that party and it must be determined whether a verdict for the party opposing the motion would be reasonably possible under the facts. *Bloom v. Ravoira*, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000).

When plain, palpable and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Mulherin-Howell v. Cobb*, 362 S.C. 588, 596, 608 S.E.2d 587, 592 (Ct. App. 2005) citing *Hedgepath v. American Tel. & Tel. Co.,* 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001).

Summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *M & M Group, Inc. v. Holmes,* 379 S.C. 468, 473, 666 S.E.2d 262, 264 (Ct. App. 2008). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 578 S.E.2d 329 (2003).

ARGUMENT

I. THE SPECIAL REFEREE DID NOT ERR WHEN IT GRANTED SUMMARY JUDGMENT CONCERNING THE RATIFICATION CAUSE OF ACTION.

A. Certus failed to prove the elements of ratification.

The first part of the analysis is to define ratification and determine its elements. Ratification is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his

subsequent assent. *Brazell Bros. Contractors v. Hill*, 245 S.C. 69, 74, 138 S.E.2d 835, 837 (1964).

The three essential elements to prove ratification are: (1) acceptance by the principal of the benefits of the agent's acts; (2) *full* knowledge of the facts: and (3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangements. *Anthony v. Padmar*, 320 S.C. 436, 454, 465 S.E.2d 745, 755 (1995). In order to establish a claim for ratification against TRR, Certus must show evidence from the record that TRR was the principal, that is, the party who ratified the November 1, 2007 loan and mortgage. TRR, and not Richard C. Bennett, is the party against whom Certus has asserted its claims, therefore Certus has to prove its case against TRR and not Richard C. Bennett.

Under South Carolina law, a principal is one who has control over the agent. See *Triplet v. Soliel Group, Inc.* 664 F.Supp.2d 645, 650 (D.S.C. 2009) *citing Fernander v. Thigpen*, 278 S.C. 140, 293 S.E.2d 424, 426 (1982). In order to prevail in its ratification cause of action Certus has to show evidence from the record that TRR controlled Rick Bennett in all the transactions Certus cited in the Initial Brief of Appellant as evidence of ratification in order to defeat TRR's motion for summary judgment. *Triplet, id.* Certus also has to prove that TRR had full knowledge of the facts surrounding the November 1, 2007 loan and that TRR intended to ratify the November 1, 2007 note and mortgage. *Anthony*, 465 S.E.2d at 755.

Certus put forth in the record two theories to support its claim for ratification. During the summary judgment hearing Certus advanced the theory that BOG ratified the November 1, 2007 mortgage and because TRR "knew" of BOG's ratification, it also

somehow ratified the mortgage. Bank admitted at the summary judgment hearing that this was "strained." (R. p. 283, Tr. p. 32: 18-23).

The first problem that Certus has in establishing TRR as a principal in any act of ratification is that TRR was not formed until July 13, 2010. (Initial Brief of Appellant, p. 8). That is almost three years after Ken Bennett entered into the November 1, 2007 loan transaction and two years after JKR transferred the property to Bennett of Greenwood ("BOG"). This concerned the trial court at the summary judgment hearing:

> But is acknowledging something the same as ratifying something? Because the Court then has to say, "Okay, Twin Rivers, you weren't in existence at the time all of this happened but now the Court is saying that you are—that you have ratified it, you have accepted anew the liability that CommunitySouth asked you to sign but you never did. So, now we're asking the Court to do something that the parties themselves could never get done." I'm troubled by that. R. p. 283, Tr. P. 32, 10-17.

Certus admitted to the trial court that it had a problem:

> Your Honor, the idea is that Twin Rivers Resort has somehow ratified this mortgage is more strained, but I do think that the argument that Bennett of Greenwood ratified this mortgage and that Twin Rivers Resort was aware of that is not strained. I think there is plenty of evidence to that. R. p. 283, Tr. P. 32, 18-23.

Certus overlooks that it asserted a claim for ratification against TRR, therefore it has to show that TRR ratified the loan and mortgage and this it cannot do. In order to make a claim for ratification against TRR, Certus has to show that there was a principal-agent relationship between TRR and BOG by showing evidence that TRR had control over BOG. *See Triplet v. Soliel Group, Inc.,* 664 F. Supp.2d at 650. What the facts on the record show is that BOG received the property from JKR on February 22, 2008, two years before TRR was formed. (R. p. 256, Tr. p. 5, 17-18). Further, BOG is a limited

liability corporation, LLC, belonging to Ken Bennett, not Rick Bennett. (R. p. 256, Tr. p. 5, 21). These facts show that (1) TRR did not exist when BOG got the property, (2) TRR had no control over BOG and (3) there was no principal-agent relationship between TRR and BOG. Contrary to Certus's theory, BOG was not an agent for TRR and therefore TRR could not have ratified the loan and mortgage transaction.

Certus next abandoned its first theory and advanced a second theory to support its claim for ratification in its Initial Appellate Brief. The second theory has two parts. The first part is that JKR ratified the mortgage on November 1, 2007 and somehow the resulting encumbrance falls on TRR, "therefore it is not necessary to demonstrate ratification of the November 1, 2007 mortgage by either BOG or Twin Rivers." (Appellant's Initial Brief, p. 12). The second part consists of Certus's argument that Rick Bennett's actions indicate ratification on TRR's part. (Appellant's Initial Brief, p. 13).

Certus cites no authority to support the first part, that is, its encumbrance theory that TRR ratified the November 1, 2007 loan and mortgage because the encumbrance traveled down the chain of title from JKR to BOG and thence from BOG to TRR. Facts from the record fail to support Certus's theory of encumbrance. First, TRR was not formed and did not come into existence until July 13, 2010, nearly three years after the November 1, 2007 loan and mortgage. Because TRR was not in existence, it was hardly in a position to ratify the mortgage. Further, Rick Bennett was not a member of JKR, LLC. (R. p. 253, Tr. p. 2: 22 – 3:4). The record indicates that Ken Bennett was present at the closing, but there is no mention of Rick Bennett. (R. p. 886, November 1, 2007 HUD closing statement). Finally, the chain of title does not show an encumbrance moving from JKR to BOG and hence to TRR. In fact, the deed transferring the property

from BOG to TRR fails to list an encumbrance at all. (R. p. 876, Deed from BOG to TRR). Certus's theory of ratification by encumbrance fails from the lack of support, both factual and legal.

Certus lists the following examples from the record to support the second part of its theory that Rick Bennett's actions led to TRR's ratification of the November 1, 2007 loan and mortgage. They are as follows:

- Rick Bennett's "If we can come to an agreement" letter; Initial Brief of Appellant, p. 13;
- Rick Bennett reported to Certus's predecessor in interest that the property taxes had been paid, *id.*;
- Rick Bennett's handwritten notes concerning debt secured by the November 1, 2007 mortgage, *id.*; and
- A TRR check made payable to Certus's predecessor in interest. *id.*

Rick Bennett's "if we can come to an agreement letter" (R. p. 890) is dated March 12, 2010, four months before TRR, LLC was formed, therefore Rick Bennett could not have been acting as TRR's agent when he wrote the letter. That alone is enough to show that the letter does not prove ratification on TRR's part. But what is also interesting is Certus's insistence that this letter proves ratification when Certus's predecessor CommunitySouth did not come to an agreement after all. CommunitySouth backed out of the agreement and later its successor Certus chose to pursue Ken Bennett and obtain a lien on him. (R. p. 691, Richard C. Bennett Dep. 43: 24-44: 13). It's ironic that only now, three years after Certus's predecessor backed out of the deal that Certus now says the letter is evidence of ratification.

The report to CommunitySouth that the property taxes had been paid is dated March 15, 2010, (R. p. 891, Report taxes have been paid, Ex. 11 Richard C. Bennett Dep.). Again, this is several months before TRR is formed and again, even though the property taxes were paid, CommunitySouth chose not to go through with the deal, so Certus cannot complain now that this document is evidence of TRR's ratification.

The handwritten notes Certus references are dated November 29, 2007 (R. p. 892, Ex. 12, Richard C. Bennett Dep.) three years before TRR was formed. There is no way these notes could possibly prove that TRR ratified the November 1, 2007 loan and mortgage, when TRR did not exist at the time.

The September 29, 2010 check written to Community South Bank was drawn on an account held by TRR, LLC. (R. p. 791, Ex. 9, Richard C. Bennett Dep.) Certus could argue that it finally has a scintilla of evidence required to defeat TRR's motion for summary judgment. However, Rick Bennett wrote a number of checks to CommunitySouth on accounts held by his other business entities (R. p. 894, Bennett checks, Ex. 12 and 18, Plaintiff's Memorandum in Opposition to Motion for Summary Judgment) and yet Certus makes no argument that the other entities ratified the November 1, 2007 loan and mortgage, just TRR.

Further, Certus cited no authority to show that making one payment towards a mortgage means that the principal ratified the mortgage. There is authority to show that the fact that a purchaser paid interest on the debt secured by the mortgage is not a ratification of the contract and the purchaser may repudiate the conveyance and the liability under the mortgage. See 27 S.C. Jur. *Mortgages* § 55 citing *Sumter Trust Co. v. Moses*, 116 S.C. 446, 107 S.E. 918 (1921).

Sumter Trust deals with Lilly V. Padgett, who sold farm land to purchase a city lot in Columbia, but did not know that the realtor who worked for her also worked for the person from whom the lot was purchased. Neither the deed nor contract was read to her so she could understand the obligations she was assuming. The Court ruled that her payment of interest was not a ratification of the contract because she was not advised of the fraud in the transaction.

In TRR's case, it was not in existence at the time of the November 1, 2007 closing on the loan and mortgage. Rick Bennett was not present at the closing and did not have the opportunity to review the loan documents and see that Ken Bennett and not JKR was named on the mortgage. TRR did not exist when the property was transferred from JKR to BOG and there is nothing to suggest that Rick Bennett reviewed the deed transferring the property and saw that an encumbrance was transferred from JKR to BOG. There is no encumbrance listed in the deed transferring the property from BOG to TRR. These facts from the record show that like Ms. Padgett, TRR was not fully informed of the transactions and therefore cannot be found to have ratified the November 1, 2007 loan based on one payment on the debt.

Further, in *Anthony v. Padmar,* 465 S.E.2d at 755, full knowledge of the facts is an essential element of ratification. Neither TRR nor Rick Bennett were present at the November 1, 2007 closing. Neither signed the JKR deed to BOG in 2008.[3] Neither knew Ken Bennett was the wrong party named in the mortgage and neither knew of an encumbrance referenced in the transfer of property between JKR and BOG. Neither TRR or its agent Rick Bennett knew the full facts of the transactions, therefore TRR cannot

[3] Richard K. Bennett signed as a member of JKR, not Richard C. Bennett.

have ratified the loan and mortgage when it made one payment towards Ken Bennett's numerous obligations with CommunitySouth.

B. TRR did not ratify either by acceptance or by silence.

Certus cites *Carr v. McColgan*, 60 A. 606 (1905) to support its premise that one payment on the loan means TRR ratified the loan by acceptance. However, the facts in *Carr* are distinguishable from the facts in this case. In *Carr, id.* Carr and his wife signed the mortgage knowing that certain information was missing from the mortgage, yet some years down the road, they argued that they were not bound by the mortgage because it was incomplete. *Carr* does not deal with the issue of the wrong party being named in the mortgage and there is no evidence on record that either TRR or Rick Bennett knew the wrong party was entered on the mortgage, indeed, TRR did not exist and Rick Bennett was not present at the November 1, 2007 closing. *Carr* also does not deal with property being transferred two entities down the chain of title over a three year period after the mortgage was signed. There is no authority in *Carr* to support Certus's premise that TRR ratified by acceptance.

Certus further argues that TRR ratified by acceptance by citing the North Carolina case of *McNeely v. Walters*, 189 S.E. 114 (N.C. 1937) as support. *McNeely* is distinguishable from the facts of this case for the following reasons: 1.) McNeely knew that his brother had executed the note and deed of trust without authority, yet remained silent; and 2.) the North Carolina court ruled that if the McNeeley's suit did not fail upon the principal of ratification, then it failed on the principal of estoppel, thus indicating that the North Carolina court was not completely sure if ratification applied to the facts of the case.

The facts of this case show that TRR did not exist at the time of the closing of the November 1, 2007 loan and mortgage, therefore it could not have known about the mortgage in Ken Bennett's name instead of JKR, LLC. Also, Ken Bennett did not sign the mortgage for TRR and indeed could not have done so seeing as TRR did not exist.

Certus also argues that by accepting the encumbrance on the property, TRR was ratifying the November 1, 2007 loan when BOG transferred the property to TRR in 2010. However, Certus also points out that the TRR deed stated that it was exempt from recording fees because the business property was valued at less than $100, so there was no notice of any encumbrance to TRR. (R. p. 876, Deed from BOG to TRR). Because TRR did not exist at the time of the November 1, 2007 loan closing and was not on notice of any encumbrance contained in its deed to the property received in 2010, *McNeeley, id.* does not lend support to Certus's argument for ratification by acceptance.

The Special Referee was also troubled by Certus's argument of ratification by acceptance. At the summary judgment hearing the Special Referee stated:

> But is acknowledging something the same as ratifying something? Because the Court then has to say, "Okay, Twin Rivers, you weren't in existence at the time all of this happened but now the Court is saying that you are—that you have ratified it, you have accepted anew the liability that CommunitySouth asked you to sign but you never did. So, now we're asking the Court to do something that the parties themselves could never get done." I'm troubled by that. R. p. 283, Tr. p. 32, 10-17.

The Special Referee should have been troubled by that. Certus's interpretation of ratification by acceptance is so broad that anyone with the slightest connection to a transaction can be found to have ratified it, even if, as in this case, the transaction took place three years before the principal existed.

Rick Bennett testified at his deposition that he was not aware of any encumbrance on the property when he formed TRR, LLC. (R. pgs. 672-673, Richard C. Bennett Dep. p. 24: 21 – p. 25: 10). Rick Bennett also testified that he did not run Bennett of Greenwood ("BOG") at all, but that he did run Twin Rivers Resort. (R. p. 678, Richard C. Bennett Dep. p. 30: 2-6). There is also nothing on the record to show that Rick Bennett was involved in the transfer of the property from JKR to BOG, so he would not have known about the encumbrance listed on that deed. What the record does show is that TRR did not ratify the November 1, 2007 loan and mortgage.

Certus next argues that TRR accepted the mortgage by silence, citing Restatement of Agency § 94 as authority. However, Certus overlooks the section in the Restatement concerning when ratification does not occur. Restatement (Third) of Agency § 4.01(3)(a) states that ratification does not occur unless the act is ratifiable as stated in Section 4.03. Section 4.03 states that "a person may ratify an act if the actor acted or purported to act as an agent on the person's behalf". Because TRR did not exist until three years after the loan was signed, Rick Bennett could not have acted as its agent on its behalf until after July 13, 2010 when TRR was formed. That means that because Rick Bennett was not TRR's agent in 2007 when the loan was signed, or in 2008 when the property was transferred to BOG, TRR did not ratify the loan. A person may ratify an act if (a) the person existed at the time of the act and (b) the person had capacity as defined in Section 3.04 at the time of ratifying the act. Restatement (Third) of Agency § 4.04(1). Before Certus can argue that TRR accepted the mortgage by silence, it must show that TRR could ratify the act, which it cannot because TRR did not exist at the time of the November 1, 2007 loan and mortgage or the 2008 transfer of property from JKR to BOG.

Therefore, Certus's second theory concerning Rick Bennett's actions fails. Because Certus could not prove the elements of ratification with evidence from the record, the Special Referee was correct to grant TRR's motion for summary judgment as to the ratification cause of action. See *M & M Group, Inc. v. Holmes,* 666 S.E.2d at p. 265, (summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner).

C. The Special Referee's order is correct.

Certus states on page 14 of its Initial Brief that ratification is much broader than the Court concluded. Certus wants to apply ratification to TRR, even though it did not exist when the property was mortgaged in 2007. It also wants to apply ratification to TRR when TRR did not acquire the property from either Ken Bennett, the mortgagor, but instead acquired it from BOG.

Scottish-American Mortg. Co. Ltd. v. Deas, 35 S.C. 42, 14 S.E. 486 (1892) does not support Certus's position for two reasons. One, it does not address the issue of when the wrong party is named in a mortgage and two, it does not address a mortgage transferred two links down the chain of title to a principal that did not exist when the mortgage was originally executed.

In *Deas, id.*, Mrs. Deas actually signed the mortgage and note, though her husband made the application for the loan without her knowledge. Further, the mortgage secured money her husband used to run her plantation with her knowledge and consent. She claimed that as a married woman, she was not bound by the transaction because she was not capable of entering into the contract. Mrs. Deas never claimed that she was the wrong party named in the mortgage.

The facts in this case do not concern a married woman whose husband put her in a bind. The facts are that Rick Bennett did not sign the mortgage and he was not present at the November 1, 2007 closing to see that CommunitySouth screwed up the mortgage and put Ken Bennett's name on it instead of JKR, LLC. The facts are also that TRR, LLC did not exist when the mortgage was signed and did not come into existence until three years later. There are also no facts to show that Ken Bennett, who signed the 2007 mortgage, was ever TRR's agent. These facts demonstrate that *Deas, id.* is distinguishable from the facts of the case and therefore does not support Certus's argument.

The cases of *McNeeley v. Walters*, 189 S.E. at 114 and *Carr v. McColgan*, 60 A. at 606-607 do not support Bank's position for the same reasons. Both *McNeeley* and *Carr* dealt with "technical defects", such as a mortgage not being completed. Neither case dealt with the wrong party being named in a mortgage. The Special Referee noted in its Order that, "This defect is more than a "technical" defect and I find and conclude that the doctrine of ratification has no application given this undisputed fact. Neither the law nor the facts give rise to a cause of action for ratification against Twin Rivers Resort, LLC". (R. p. 1, Order of Judge Simmons, April 14, 2014, pgs1-2).

The Special Referee is correct in finding that the law and facts of the case do not give rise to a cause of action for ratification. Its citing of *Deas* supports its finding because it found that *Deas* was distinguishable from the facts of the case and therefore TRR did not ratify the loan and mortgage.

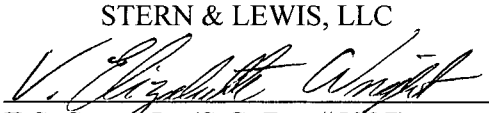
CONCLUSION

Certus failed to prove a cause of action for ratification against TRR because it could not show that TRR was a principal to Ken Bennett at the November 1, 2007 closing

on the mortgage and it could not show that Rick Bennett was present at the closing. It could not show that TRR was a principal to BOG or JKR. Certus also could not show that the one check Rick Bennett wrote meant that TRR was fully informed of the 2007 mortgage and the encumbrance on the property. Because Certus cannot prove the elements of ratification, summary judgment is appropriate as a matter of law. The Special Referee's decision should be affirmed and Certus's appeal should be denied.

Respectfully submitted.

COVINGTON, PATRICK, HAGINS,
STERN & LEWIS, LLC



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January 15, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Special Referee

Case No. 2011-CP-30-00583

Certus Bank, N.A. ..... Appellant,

v.

Kenneth E. Bennett, Twin Rivers Resort, LLC and
Bennett of Greenwood, LLC ..... Defendants.

Of which Twin Rivers Resort, LLC, is the ..... Respondent.

Appellate Case No. 2014-001248

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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