

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

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Appellant Case No. 2020-000023

---

**RECEIVED**

**Sep 30 2020**

**SC Court of Appeals**

James Bennett Schwiers,.....Respondents,

v.

Gene Baxley Schwiers,.....Appellants,

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RECORD ON APPEAL

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STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

James Bennett Schwiers,  
Plaintiff,

vs.

Gene Baxley Schwiers,  
Defendant.

IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT

CASE NO.: 2019-CP-23-00049

**ORDER**

This matter comes before the Court upon Plaintiff's Motion to Compel Reference in a foreclosure action. The motion was heard on November 18, 2019. James Cassidy was present and appeared on behalf of the Plaintiff. Burl Williams was present and appeared on behalf of the Defendant. After hearing both arguments and carefully reviewing the relevant law, I find that the matter should be referred to the Master in Equity per the Supreme Court ruling in *Carolina First Bank v. BADD, LLC* 414 S. C. 289, 778 S.E. 2d 106 (2015) and *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C 321, 328, 755 S.E. 2d. 437 (2014). I find that the counterclaims asserted by the Defendant are legal but permissive in that Defendant alleges breach of a 2006 agreement as opposed to the underlying 2005 Note and Mortgage. The remaining Counterclaims stem from Plaintiff's alleged conduct after 2006. Thus, the Defendant has no right to a jury trial on these permissive counterclaims. I make no finding as to whether the counterclaims violate the Statute of Frauds or are otherwise justiciable.

Therefore, for the reasons stated above,

IT IS ORDERED that the above-entitled action be and the same is hereby referred to the Honorable Charles B. Simmons, Jr., as Master-in-Equity for Greenville County, pursuant to Rule

53 of the South Carolina Rules of Civil Procedure, for the purpose of conducting a full hearing on this matter and entering a final judgment thereon, as well as conducting hearings or entering orders after final judgment, with any appeal being directly to the Supreme Court.

IT IS FURTHER ORDERED that, in the event the Master-in-Equity should find that a judicial sale of the subject real property is warranted, the Master-in-Equity, pursuant to Section 15-39-680 of the Code of Laws of South Carolina, 1976, as amended, may designate that said sale be conducted on the regular day of judicial sales or at such other time as the Master-in-Equity may deem just and proper.

IT IS SO ORDERED.

(JUDGE'S SIGNATURE PAGE TO FOLLOW)



Greenville Common Pleas

**Case Caption:** James Bennett Schwiers vs. Gene Baxley Schwiers  
**Case Number:** 2019CP2300049  
**Type:** Order/Other

So Ordered

s/ Robin B. Stilwell 2158

Electronically signed on 2019-11-27 09:23:44 page 3 of 3

ELECTRONICALLY FILED - 2019 Nov 27 10:40 AM - GREENVILLE - COMMON PLEAS - CASE#2019CP2300049





Greenville Common Pleas

**Case Caption:** James Bennett Schwiers vs. Gene Baxley Schwiers  
**Case Number:** 2019CP2300049  
**Type:** Order/Other

So Ordered

s/ Robin B. Stilwell 2158

Electronically signed on 2019-12-20 09:32:52 page 2 of 2

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
James Bennett Schwiers,	)	
	)	
Plaintiff,	)	
	)	<b>SUMMONS FOR RELIEF</b>
vs.	)	
	)	
Gene Baxley Schwiers,	)	
	)	
Defendant.	)	
_____	)	

You are hereby summoned and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at Post Office Box 10529, Greenville, S.C. 29603, within thirty (30) days after the service hereof, except as to the United States of America (if a named party), which shall have sixty (60) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint, appear, or defend within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

/s/James H. Cassidy  
 James H. Cassidy, ID No. 1160  
[jcassidy@roecassidy.com](mailto:jcassidy@roecassidy.com)  
 Roe Cassidy Coates & Price, P.A.  
 Attorneys for Plaintiff  
 Post Office Box 10529  
 Greenville, SC 29603  
 (864) 349-2600

Greenville, South Carolina  
 Date: January 3, 2019

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
James Bennett Schwiers,	)	
	)	<b>FORECLOSURE COMPLAINT</b>
Plaintiff,	)	(Deficiency Requested)
	)	Non-Jury Proceeding
vs.	)	Non-Eligible Under HMP
	)	Foreclosure Intervention Inapplicable
Gene Baxley Schwiers,	)	
	)	
Defendant.	)	
_____	)	

The Plaintiff, James Bennett Schwiers (hereinafter “Plaintiff”), complaining of the above-named Defendants would respectfully show unto the Court that:

1. Plaintiff is a citizen and resident of the County of Greenville, State of South Carolina.
2. This is an action to foreclose a mortgage covering real estate situated in the County of Greenville, State of South Carolina.
3. Upon information and belief, the Defendant, Gene Baxley Schwiers (hereinafter “Debtor”), is a citizen and resident of the County of Greenville, State of South Carolina.
4. This Court therefore has jurisdiction over the parties and subject matter hereto.
5. The Loans, Notes, and Mortgages which are the subject of this foreclosure action are not owned or guaranteed by Fannie Mae or Freddie Mac and are not owned, guaranteed, or managed by a servicer who has signed an agreement to participate in the Home Affordable Modification Program, and therefore are not subject to modification under the Homeowner Affordability and Stability Plan, the Home Affordable Modification Program, and/or the United States Treasury Supplemental Directive 09-01 (collectively referred to hereafter as “HMP”).

6. On May 2, 2011, the Honorable Jean Hofer Toal, Chief Justice of the South Carolina Supreme Court, in the matter identified as *Re: Mortgage Foreclosure Actions*, issued an Administrative Order (S.C. Supreme Court Order No. 2011-05-02-01). The property which stands as collateral for the loans, notes and mortgages giving rise to this foreclosure action are not “owner-occupied” as defined in the said Order, and therefore are not subject to any stay or right of modification under S.C. Supreme Court Order No. 2011-05-02-01.

7. Plaintiff is entitled to proceed with this foreclosure action.

9. For value received, Debtor, executed and delivered a promissory note to Plaintiff dated November 10, 2005, (hereinafter “Note”) containing a promise to pay the principal sum of Five Hundred Twenty-six Thousand Three Hundred Twenty-two and 89/100 Dollars (\$526,322.89), together with interest thereon upon such terms as are contained in said Note, with interest thereon upon such terms as are contained in said Note, a copy of which is attached hereto, marked “**Exhibit A,**” and incorporated herein by reference, the same as if fully set forth in this Complaint.

10. In order to secure the payment of the Note, and all renewals, extensions, substitutions, and/or modifications thereof, and/or any future advances Debtor executed and delivered to Plaintiff a mortgage of even date and identical amount (hereinafter “Mortgage”), whereby there was conveyed unto Bank by way of said Mortgage the property described as follows:

ALL that certain piece, parcel or lot of land, lying and being in the State of South Carolina, County of Greenville, being known and designated as Lot 14 on a plat of Stonebrook Farms, Phase 1 dated January 7, 1997, recorded in the ROD Office for Greenville County in Plat Book 34-V at Page 72 as more specifically shown on a survey prepared for William B. Anton and Teresa P. Anton prepared by Site Design, Inc. dated August 14, 1998 and recorded in the ROD Office for Greenville County in Plat Book 38-O at Page 13. Reference is hereby made to the

most recent survey for a more complete and accurate metes and bounds description thereof.

This being the same property conveyed to Gene Baxley Schwiers herein by deed from William B. Anton, Trustee Under the Anton Living Trust Dated 2/4/98 and Teresa P. Anton, Trustee Under the Anton Living Trust Dated 2/4/98 recorded on November 11, 2005, in the Office of the Register of Deeds for Greenville County in Deed Book 2175 at Page 551.

TMS No.: 0530.17-01-014.00

Property Address: 4 East Cleveland Bay Court, Greenville, SC 29615.

11. Said Mortgage was recorded in Mortgage Book 4468 at Page 304 on November 11, 2005, in the Office of the Register of Deeds for Greenville County. A copy of the aforementioned Mortgage is attached hereto, marked “**Exhibit B,**” and incorporated herein by reference, the same as if fully set forth in this Complaint.

12. The terms of said Note, and the Mortgage securing same, provided, among other things, that on failure to pay any installment of either principal or interest, or any portion thereof, when due or on failure to comply with any of the conditions and requirements in said documents, then the whole principal sum and accrued interest shall, at the option of the legal holder thereof, become immediately due and payable and collectable by foreclosure.

13. The maker of said documents further agreed to pay attorney's fees in an amount not more than 15% of the amount owing in the event said Note should be collected or foreclosed by an attorney.

14. The subject mortgage loan account is presently in arrears and Plaintiff, under the terms of the subject Note and Mortgage, has and hereby does declare the entire outstanding indebtedness to be immediately due and payable.

15. Plaintiff is the owner and holder of said Note and Mortgage.

16. Debtor is the record owner of the subject real and personal property.

17. Plaintiff's Mortgage constitutes a first lien upon the subject real and personal property.

18. The subject loan account is in default under the terms of the Note, Mortgage, and for non-payment. Plaintiff, under the terms of the subject Note and Mortgage, has and hereby does declare the entire outstanding indebtedness to be immediately due and payable. There is now due and owing on said Note and Mortgage the sum of Seven Hundred Ninety-one Thousand Six Hundred Forty-four and 14/100 Dollars (\$791,644.14) with interest from December 7, 2018, at the rate set forth in the subject Note, together with all costs and expenses of this action and attorney's fees, said Note and Mortgage having been placed in the hands of Roe Cassidy Coates & Price, P.A. for collection/foreclosure.

19. Plaintiff alleges that it is entitled to have its Mortgage foreclosed, the premises sold, any equity of redemption barred, and the proceeds applied toward the payment of its debts.

20. Plaintiff is seeking a deficiency judgment against Defendant, Gene Baxley Schwiers, for any deficiency owing after application of the proceeds from the sale of the mortgaged premises and does hereby ask for a personal or deficiency judgment in the event that the proceeds of sale or value of the property acquired by Plaintiff at sale are not adequate to satisfy the indebtedness due Plaintiff under the terms of the subject Note and Mortgage.

21. THE NOTICE REQUIRED BY THE FAIR DEBT COLLECTION PRACTICES ACT, IF APPLICABLE, IS ATTACHED HERETO AS "EXHIBIT C" AND INCORPORATED HEREIN BY REFERENCE.

22. This Summons and Complaint is an attempt to collect the debt and any information obtained will be used for that purpose.

WHEREFORE, Plaintiff prays:

- (1) That Plaintiff's Mortgage be declared a lien on the subject property;
- (2) That it have judgment against the mortgaged premises for the sum of Seven Hundred Ninety-one Thousand Six Hundred Forty-four and 14/100 Dollars (\$791,644.14) with interest from December 7, 2018 at the rate set forth in the subject Note; together with attorney's fees, necessary payment of taxes, insurance, and/or advancements; and for the cost of this action;
- (3) That the mortgaged premises and collateral be sold, any equity of redemption barred, and that Plaintiff be granted a deficiency judgment against Defendant, Gene Baxley Schwiers, for any deficiency remaining after the application of the proceeds of sale to the amount of judgment; and
- (4) For such other and further relief as the Court deems just and proper.

/s/James H. Cassidy  
James H. Cassidy, ID No. 1160  
[jcassidy@roecassidy.com](mailto:jcassidy@roecassidy.com)  
Roe Cassidy Coates & Price, P.A.  
Attorneys for Plaintiff  
Post Office Box 10529  
Greenville, SC 29603  
(864) 349-2600

Greenville, South Carolina  
Date: January 3, 2019

PROMISSORY NOTE

\$526,322.89                      Greenville, South Carolina                      November, 10, 2005

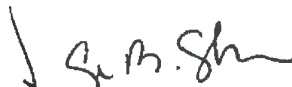
FOR VALUE RECEIVED, Gene Baxley Schwiers promises to pay to, James Bennett Schwiers or order, the sum of Five Hundred Twenty-six Thousand Three Hundred Twenty-two dollars and eighty-nine cents (\$526,322.89), with interest thereon from the date hereof at the rate of Three (3.00) percent per annum, to be computed and paid AS FOLLOWS: Monthly interest only payments In the sum of \$1,368.94 each, commencing on December 10, 2005 and continuing on the same day of each month for twenty-three consecutive months, with one final balloon payment of all principal and accrued interest due and payable on due on November 10, 2007, the maturity date hereof.

Any payment received more than Ten (10) days after the due date shall incur a late payment penalty of Five (5%) Percent of that month's payment amount.

THE MAKER hereof reserves the right to prepay, prior to maturity, all or any portion of the outstanding principal balance of the within Note, without penalty.

AND I (WE) hereby agree that if at any time any portion of said principal or interest shall be past due and unpaid, the whole amount evidenced by this Note shall, at the option of the Holder hereof, become immediately due, and said Holder shall have the right to institute any proceedings upon this Note and any collaterals given to secure the same for the purpose of collecting said principal and interest, with costs and expenses, and of protecting any security connected herewith.

AND I (WE) further agree that if any part of the money due hereon be not paid when due, or if this Note be placed in the hands of any attorney for collection, or if this debt or any part thereof be collected by an attorney or by legal proceedings of any kind, an attorney's fee of fifteen (15%) percent besides all costs and expenses incident upon such collection, shall be added to the amount due upon this Note, and be collectible as a part thereof.



Gene Baxley Schwiers



BOOK 4468 PAGE 304 ✓

FILED  
GREENVILLE, SC  
STATE OF SOUTH CAROLINA )

COUNTY OF GREENVILLE )  
2005 NOV 11 P 12:50

MORTGAGE OF REAL ESTATE

TO ALL WHOM THESE PRESENTS MAY CONCERN:  
TIMOTHY L. PRESNYS  
REGISTER OF DEEDS

WHEREAS, Gene Baxley Schwiers (hereinafter referred to as Mortgagor) are well and truly indebted unto James Bennett Schwiers, at 224 East Augusta Place, Greenville, SC 29605, (hereinafter referred to as Mortgagee), as evidenced by Mortgagor's Promissory Note dated November 10, 2005, in the sum of Five Hundred Twenty-Six Thousand Three Hundred Twenty-Two Dollars and Eighty-nine Cents(\$526,322.89) due and payable according to the terms of said Note, with a maturity date of November 10, 2007.

WHEREAS, the Mortgagor may hereafter become indebted to the said Mortgagee for such further sums as may be advanced to or for the Mortgagor's account for taxes, insurance premiums, public assessments, repairs or for any other purposes:

NOW, KNOW ALL MEN, That the Mortgagor, in consideration of the aforesaid debt, and in order to secure the payment thereof, and of any other and further sums for which the Mortgagor may be indebted to the Mortgagee at any time for advances made to or for his account by the Mortgagee, and also in consideration of the further sum of Five and 00/100 Dollars (\$5.00) to the Mortgagor in hand well and truly paid by the Mortgagee at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto the Mortgagee, its heirs, successors and assigns:

For property description see attached Exhibit "A".

Together with all and singular rights, members, hereditaments and appurtenances to the same belonging in any way incident or appertaining, and of all the rents, issues and profits which may arise or be had therefrom, and including all heating, plumbing and lighting fixtures now or hereafter attached, connected or fitted thereto in any manner; it being the intention of the parties hereto that all such fixtures and equipment, other than the usual household furniture, be considered a part of the real estate.

107235

11-11-2005 01:01:3072



TO HAVE AND TO HOLD, all and singular, the said premises unto the Mortgagee, its heirs, successors and assigns forever.

The Mortgagor covenants that it is lawfully seized of the premises hereinabove described in fee simple absolute, that it has good right and is lawfully authorized to sell, convey or encumber the same, and that the premises are free and clear of all liens and encumbrances except as provided herein. The Mortgagor further covenants to warrant and forever defend all and singular the said premises unto the Mortgagee forever, from and against the Mortgagor and all persons whomsoever lawfully claiming or to claim the same or any part thereof.

Mortgagor further covenants and agrees as follows:

1. That this mortgage shall secure the Mortgagee for such further sums as may be advanced hereafter, at the option of the Mortgagee, for the payment of taxes, insurance premiums, public assessments, repairs or other purposes pursuant to the covenants herein. This mortgage shall also secure the Mortgagee for any further loan advances, readvances or credits that may be made hereafter to the Mortgagor by the Mortgagee so long as the total indebtedness thus secured does not exceed the original amount shown on the face hereof. All sums so advanced shall bear interest at the same rate as the mortgage debt and shall be payable on demand of the Mortgagee unless otherwise provided in writing.

2. That it will keep all improvements now existing or hereafter erected on the mortgaged property insured as may be required from time to time by the Mortgagee against loss by fire and any other hazards specified by Mortgagee, in an amount not less than the mortgage debt, or in such amounts as may be required by the Mortgagee, and in companies acceptable to it and that all such policies and renewals thereof shall be held by the Mortgagee and shall have attached hereto loss payable clauses in favor of, and in form acceptable to, the Mortgagee and that it will pay all premiums therefor when due; and that it does hereby assign to the Mortgagee the proceeds of any policy insuring the mortgaged premises and does hereby authorize each insurance company concerned to make payment for a loss directly to the Mortgagee, to the extent of the balance owing on the Mortgage debt, whether due or not.

3. That it will keep all improvements now existing or hereafter erected on the premises in good repair, and, in the case of a construction loan, that it will continue construction until completion without interruption, and should it fail to do so, the Mortgagee may, at its option, enter upon said premises, make whatever repairs are necessary, including the completion of any construction work underway, and charge the expenses for such

repairs or the completion of such construction to the mortgage debt.

4. That it will pay, when due, all taxes, assessments and other governmental or municipal charges, fines or other impositions against the mortgaged premises. That it will comply with all governmental and municipal laws and regulations affecting the mortgaged premises.

5. That it hereby assigns all rents, issues and profits of the mortgaged premises from and after any default hereunder, and agrees that, should any legal proceedings be instituted pursuant to this instrument, any judge having jurisdiction may, at Chambers or otherwise, appoint a receiver of the mortgaged premises, with full authority to take possession of the mortgaged premises and collect the rents, issues and profits, including a reasonable rental to be fixed by the Court in the event said premises are occupied by the Mortgagor and after deducting all charges and expenses attending such proceeding and the execution of its trust as receiver, shall apply the residue of the rents, issues and profits toward the payment of the debt secured hereby.

6. That if there is a default in any of the terms, conditions or covenants of this mortgage, or of the Note secured hereby, then, at the option of the Mortgagee, all sums then owing by the Mortgagor to the Mortgagee shall become immediately due and payable, and this mortgage may be foreclosed. Should any legal proceedings be instituted for the foreclosure of this Mortgage, or should the Mortgagee become a party of any suit involving this Mortgage or the title to the premises described herein, or should the debt secured hereby or any part thereof be placed in the hands of an attorney for collection by suit or otherwise, all costs and expenses incurred by the Mortgagee, and a reasonable attorney's fee, shall thereupon become due and payable immediately or on demand, at the option of the Mortgagee, as a part of the debt secured hereby, and may be recovered and collected hereunder.

7. That the Mortgagor shall hold and enjoy the premises above conveyed until there is a default under this Mortgage or in the Note secured hereby. It is the true meaning of this instrument that if the Mortgagor shall fully perform all the terms, conditions and covenants of this mortgage and of the Note secured hereby, that then this mortgage shall be utterly null and void; otherwise to remain in full force and virtue.

8. Should Mortgagor sell, convey, transfer, dispose or of further encumber said property, or any part thereof, or any interest therein, or agree so to do, without the written consent of the Mortgagee being first obtained, the Mortgagee shall have the right, at its option, to declare all sums secured hereby forthwith due and payable.



EXHIBIT A

ALL that certain piece, parcel or lot of land, lying and being in the State of South Carolina. County of Greenville, being known and designated as Lot 14 on a plat of Stonebrook Farms, Phase 1 dated January 7, 1997, recorded in the ROD Office for Greenville County in Plat Book 34-V at Page 72 as as more specifically shown on a survey prepared for William B. Anton and Teresa P. Anton prepared by Site Design, Inc. Dated August 14, 1998 and recorded in the ROD Office for Greenville County in Plat Book 38-O at Page 13. Reference is hereby made to the most recent survey for a more complete and accurate metes and bounds description thereof.

506-75

This being the same property conveyed to the Mortgagors herein by deed from William B. Anton, Trustee Under the Anton Living Trust Dated 2/4/98 and Teresa P. Anton, Trustee Under the Anton Living Trust Dated 2/4/98 recorded on November 11, 2005, in the Office of the Register of Deeds for Greenville County in Deed Book 2175 at Page 551.

RECORDED  
11/11/05

FILED FOR RECORD IN GREENVILLE  
COUNTY SC R.O.D. OFFICE AT 12:50 PM  
11 11 05 RECORDED IN MORTGAGE  
BOOK 4468 PAGE 0304 THRU 0308  
DOC # 2005107235  
*Timothy H. Long*

NOTICE PURSUANT TO 15 U.S.C.A. 1692(g)

TO: Gene Baxley Schwiers  
4 East Cleveland Bay Court  
Greenville, SC 29615

FROM: James H. Cassidy  
Roe Cassidy Coates & Price, P.A.  
Post Office Box 10529  
Greenville, SC 29603  
(864) 349-2600

DATE: January 3, 2019

NOTE AMOUNT: \$526,322.89

CREDITOR: James Bennett Schwiers

BALANCE DUE: \$791,644.14, plus interest and late fees from December 7, 2018, and costs and attorney's fees

Please be advised that you have the right, within thirty (30) days of receipt of this letter, to dispute the validity of all or part of this debt. Unless you dispute the validity of the debt, or any portion thereof, within thirty (30) days of receipt of this letter, the debt will be assumed to be valid.

Please be advised that if you notify us in writing at the above-referenced address within the thirty (30) day period, we will obtain verification of the debt or a copy of a judgment against you, if any, and mail you a copy of such judgment or verification.

Please be advised that upon written request to this office within the thirty (30) day period, we will provide you with the name and address of the original creditor, if different from the current creditor.

This notice is not a thirty (30) day grace period. The creditor is pursuing collection efforts immediately and will not wait thirty (30) days. If you do not answer or otherwise plead within the thirty (30) day period as set forth in the Summons attached to the Complaint, the Plaintiff will seek a default judgment against you as set forth within the Summons and Complaint.

This notice is an attempt to collect the debt and the information obtained will be used for that purpose.



STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 James Bennett Schwiers, )  
 )  
 Plaintiff, )  
 vs. )  
 )  
 Gene Baxley Schwiers, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 ANSWER, AFFIRMATIVE  
 DEFENSES TO FORECLOSURE  
 COMPLAINT, AND COUNTERCLAIM  
 2019CP2300049  
 JURY TRIAL DEMANDED

Defendant Gene Baxley Schwiers answers Plaintiff James Bennett Schwiers's Foreclosure Complaint as follows:

1. Defendant admits the allegation in paragraph 1 of the Foreclosure Complaint.
2. Defendant states that as to the allegation in paragraph 2, the title of the pleading speaks for itself, and to the extent Plaintiff insists there are allegations stated therein, denies said allegations.
3. Defendant admits the allegation in paragraph 3 of the Foreclosure Complaint.
4. Defendant admits the allegations in paragraph 4 of the Foreclosure Complaint.
5. Defendant states that Paragraphs 5 and 6 of the Foreclosure Complaint state legal conclusions rather than direct allegations, and to the extent Plaintiff insists there are allegations stated therein, such are denied in their entirety.
6. Defendant denies the allegation in paragraph 7 of the Foreclosure Complaint.<sup>1</sup>

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<sup>1</sup>There is no paragraph 8 in the electronically filed Foreclosure Complaint.

**ENTERED COMPUTER**

7. Defendant states that Exhibit A referenced in paragraph 9 of the Foreclosure Complaint speaks for itself, and to the extent Plaintiff insists there are allegations stated in paragraph 9, such are denied in their entirety.

8. Defendant denies the allegations in paragraph 10 of the Foreclosure Complaint.

9. Defendant states that Exhibit B referenced in paragraph 11 of the Foreclosure Complaint speaks for itself, and to the extent Plaintiff insists there are allegations stated in paragraph 11, such are denied in their entirety.

10. Defendant denies the allegations in paragraph 12 of the Foreclosure Complaint.

11. Defendant denies the allegations in paragraph 13 of the Foreclosure Complaint.

12. Defendant denies the allegations in paragraph 14 of the Foreclosure Complaint.

13. Defendant denies the allegations in paragraph 15 of the Foreclosure Complaint.

14. Defendant admits the allegations in paragraph 16 of the Foreclosure Complaint.

15. Defendant denies the allegations in paragraph 17 of the Foreclosure Complaint.

16. Defendant denies the allegations in paragraph 18 of the Foreclosure Complaint.

17. Defendant denies the allegation in paragraph 19 of the Foreclosure Complaint.

18. Defendant is without sufficient knowledge or information to form a belief about the allegations in paragraph 20 of the Foreclosure Complaint and therefore denies all allegations.

19. Defendant states that Exhibit C referenced in paragraph 21 of the Foreclosure Complaint speaks for itself, and to the extent Plaintiff insists that paragraph 21 contains allegations, such are denied in their entirety by Defendant.

20. Defendant denies the allegations in paragraph 22 of the Foreclosure Complaint.

#### **AFFIRMATIVE DEFENSES**

##### **First Affirmative Defense**

21. The Foreclosure Complaint fails to state a claim upon which relief may be granted.

##### **Second Affirmative Defense**

22. Plaintiff has suffered no legally cognizable damages as a result of any acts or omissions of Defendant.

##### **Third Affirmative Defense**

23. Plaintiff's claims, while all affirmatively denied by Defendant, arise solely from Plaintiff's own acts and decisions and/or the acts of third parties over which Defendant has no authority, control, or responsibility, and not from actions taken by Defendant.

##### **Fourth Affirmative Defense**

24. Plaintiff is barred from any recovery sought in the Foreclosure Complaint by the doctrine of estoppel.

**Fifth Affirmative Defense**

25. Plaintiff is barred from any recovery sought in the Foreclosure Complaint by the doctrine of waiver.

**Sixth Affirmative Defense**

26. Plaintiff is barred from any recovery sought in the Foreclosure Complaint by the doctrine of accord and satisfaction.

**Seventh Affirmative Defense**

27. Plaintiff is barred from any recovery sought in the Foreclosure Complaint by the doctrine of unclean hands.

**Eighth Affirmative Defense**

28. Plaintiff is barred from any recovery sought in the Foreclosure Complaint by the doctrine of ratification.

**Ninth Affirmative Defense**

29. Because Plaintiff forgave Defendant of any debt due and owing under the November 2005 Promissory Note, any lien securing the Promissory Note was relinquished, and Plaintiff is barred from bringing a foreclosure action against Defendant.

**Tenth Affirmative Defense**

30. Plaintiff fails to state a claim for the award of attorney's fees under South Carolina law.

**Eleventh Affirmative Defense**

31. Defendant reserves the right to supplement and/or amend her Answer and Affirmative Defenses to include additional affirmative defenses as deemed necessary by the evidence discovered during the course of litigation. Defendant has been diligently trying to obtain an attorney with her limited resources and asks the Court's indulgence to allow her to amend these pleadings upon obtaining counsel.

WHEREFORE, Defendant Gene Baxley Schwiers respectfully requests this Court to enter an order dismissing Plaintiff James Bennett Schwiers's Foreclosure Complaint in its entirety, that Defendant be awarded reasonable costs and attorney's fees incurred in this action, and that Defendant be awarded any further relief deemed just and proper by the Court at this time.

**COUNTERCLAIMS**

For Defendant/Counterclaimant Gene Baxley Schwiers's ("Gene Baxley") counterclaim against Plaintiff James Bennett Schwiers ("JB"), Gene Baxley states as follows:

**GENERAL ALLEGATIONS COMMON TO EACH**

**COUNTERCLAIM FOR RELIEF**

32. Gene Baxley is a resident of the County of Greenville, South Carolina.

33. JB is a resident of the County of Greenville, South Carolina, and is Gene Baxley's brother.

34. This Court has jurisdiction over the parties and subject matter of this Counterclaim.

35. Gene Baxley is informed and believes that during the initial time periods relative to this case, JB worked in Greenville, SC at Summit Bank as its chief operating officer and executive vice-president. He then later became the regional executive for First Citizens Bank after it purchased Summit Bank. He is currently the president of GrandSouth Bank.

36. In 2003 Gene Baxley moved back to Greenville, SC from Atlanta, GA to be closer to her mother who was battling cancer and moved into her mother's old home. Gene Baxley's employer at the time, MCI, assisted financially in the relocation since she continued her employment with the company.

37. After months of house searching, Gene Baxley found a home in Fountain Inn at an asking price of \$390,000 that was a little over her budget but possibly in her price range if the final sales price were sufficiently lowered.

38. JB, through whom Gene Baxley anticipated obtaining a mortgage to purchase her home, either from his bank or otherwise, did not approve of the Fountain Inn home and would not agree to her purchase of the prospective residence.

39. In 2005 Gene Baxley, JB and their mother found the subject Stonebrook Farm home that all of them liked. JB liked the property as he felt it was a suitable home for Gene Baxley to live in and take care of their mother. The home had a sales price of \$524,000

which was considerably outside of Gene Baxley's budget. At this time JB, who was working at First Citizens Bank, was well aware of Gene Baxley's income and expenses through a prior mortgage Gene Baxley obtained from his bank on other real estate. JB and the parties' mother worked out an arrangement for JB to advance the money to purchase the home since JB knew the price of the subject home was over and above what Gene Baxley could borrow from an arms-length commercial lender. JB offered to advance the funds for the purchase of the Stonebrook Farm home because their mother's home was dilapidated and he wanted his mother to have a better place to live.

40. On November 10, 2005, Gene Baxley purchased the Stonebrook Farm home for \$524,000. Gene Baxley through her earnest money deposit paid the seller \$5,000 at closing toward the purchase, and her employer at the time, MCI, paid all the buyer's closing costs. Gene Baxley therefore owed a balance of \$519,000 at closing. On the same day, JB's long-time lawyer and friend who handled the closing for Gene Baxley, drafted a Promissory Note and Mortgage for Gene Baxley to sign in favor of JB in the amount of \$526,322.89 to allow Gene Baxley to purchase Stonebrook Farms in Greenville, South Carolina, as her residence.

41. Gene Baxley currently resides in the Stonebrook Farms home along with the parties' mother Billie Schwiers.

42. After the Promissory Note was entered into, Gene Baxley made monthly payments due under the Note for a period of approximately six months, until mid-2006. In July 2006, Gene Baxley lost her job with MCI as a result of MCI's massive downsizing.

43. In July 2006, Gene Baxley met with JB at his office at First Citizens Bank to make two monthly loan payments to him under the Note. JB refused the payments and stated: "You need the money more than me."

44. During this time period and to the present day, JB has lived and continues to live on land and in a home donated by the parties' mother Billie Gene Baxley Schwiers to the Billie Gene Baxley Schwiers, Limited Partnership. Throughout this time period and to the present day, JB lives and has lived rent-free in the home owned by their mother's partnership.

45. In the fall of 2006, approximately three months after the July 2006 meeting between the parties in JB's First Citizens' office, and before Gene Baxley had secured new employment, JB met with Gene Baxley at JB's residence located on the property owned by the Billie Gene Baxley Schwiers, Limited Partnership. During this meeting in the fall of 2006, JB told Gene Baxley that she no longer had to worry about the 2005 Promissory Note because he had plenty of money. JB further told Gene Baxley that she should not worry about the Note and just take care of their mother, and everything would be fine. JB specifically forgave all further payments due and owing by Gene Baxley to him on the Note in the fall of 2006.

46. After Gene Baxley lost her MCI job, she did not find new employment until December 2006. JB was aware of Gene Baxley's job loss and inability to secure immediate employment and stated that for this additional reason, he no longer expected Gene Baxley to pay the balance due and owing on the 2005 Promissory Note. JB reasonably and unambiguously forgave all further indebtedness by Gene Baxley on the Note. In consideration, Gene Baxley and JB agreed that Gene Baxley would take care of their mother, who has faced multiple serious ailments, for the duration of their mother's life.

47. The parties' mother during this time period has endured back surgery, neck surgery for infectious disease requiring extensive home care, heart failure requiring open heart surgery, heart defibrillator implant surgery, and two bouts of cancer which are ongoing. She is 88 years old and confined to a wheelchair.

48. In December 2006, Gene Baxley secured new full-time employment with The Fresh Market where she worked through August of 2015 until her position was eliminated in a corporate reorganization. From December 2006 through August 2015, while Gene Baxley was employed full-time as a salaried senior director of talent acquisitions, she continued to take care of her mother who predominantly lived with her at the subject premises in Stonebrook Farm while Gene Baxley was in Greenville. JB was aware during this time that Gene Baxley was working full-time at The Fresh Market. Throughout this time and in accord with the parties' fall 2006 agreement, JB never asked Gene Baxley for any payments on the 2005 Promissory Note.

49. Since the fall of 2006, Gene Baxley has reasonably relied on her agreement with JB that the balance due and owing under the terms of the 2005 Promissory Note was forgiven, and JB reasonably relied on Gene Baxley's agreement to be their mother's primary caregiver.

50. Despite JB's agreement to forever forgive the amount due under the 2005 Promissory Note, Gene Baxley has always intended to repay JB the amount of the principal he advanced for the purchase of the Stonebrook Farm home in the event the home was sold.

51. Gene Baxley's new position with The Fresh Market in 2006 was through the company's Greensboro, NC office. Shortly after taking the new job in December 2006, Gene Baxley placed the home on the market for sale but continued to live in the home to help sell the property instead of relocating to Greensboro, NC. JB informed Gene Baxley that he was in agreement with her selling the home and stated that Gene Baxley could probably sell the house for more than he paid for it and that if the house were sold Gene Baxley could retain the sales proceeds over and above the amount JB advanced for the house. JB further stated that Gene Baxley's sale of the house would provide her with some money. Gene Baxley did not relocate to Greensboro, NC but instead worked remotely and traveled back and forth to Greensboro, NC to care for her mother.

52. By entering into the fall 2006 agreement, JB and Gene Baxley agreed that JB intentionally and purposefully forever relinquished his right under the November 2005 Promissory Note to pursue any further payment from Gene Baxley and to release Gene

Baxley from any claim by him to any amounts due and owing under the 2005 Promissory Note.

53. Further, by entering into the fall 2006 agreement, JB and Gene Baxley agreed that Gene Baxley and their mother could remain at the Stonebrook Farm home as long as Gene Baxley continued to provide care for their mother. Gene Baxley has in fact continued to provide care for their mother. JB has never taken care of the parties' mother or provided her with any non-financial assistance.

54. Indeed, since July 2006, Gene Baxley has been and remains Billie B. Schwiers's primary caregiver and JB has played no role in caring for his mother for the last 20 years. All of the mother's clothing, food, health-care expenses, car insurance, personal needs, and household goods have been paid for by Gene Baxley.

55. Yet, despite upholding her end of the parties' fall 2006 agreement, over the past nine months, JB has aggressively attempted to resurrect the relinquished 2005 Promissory Note by seeking the balance once owing under the 2005 Promissory Note along with interest and late charges all totaling over \$791,000. However, as recently as February 9, 2017 JB e-mailed Gene Baxley that homes in her neighborhood were selling for \$620,000 and that she should consider selling the home. He stated: "You might be able to get more than you owe and put some money in your pocket. It would certainly help your overall cash flow..." (See Exhibit A incorporated herein). Since JB understood that he had agreed with Gene Baxley not to charge her for interest and late charges, he acknowledged in the February 9, 2017 e-

mail that Gene Baxley would be “put[ting] some money in [her] pocket” by selling the house in the \$620,000 range.

56. Similarly, as recently as April 17, 2018 JB in effect acknowledged that he and Gene Baxley had agreed that he would not be collecting interest and late charges under the 2005 Promissory Note that he now attempts to collect. Gene Baxley e-mailed JB on April 16, 2018 stating: “... I also want out of Stonebrook Farm and want to be able to sale the house and give you back what is owed.” JB replied the next day: “...What you want to do sounds like a good plan to me...” (See Exhibit B incorporated herein). With JB believing the home would sell in the \$620,000 range, the sale of the home could only cover what the parties had agreed was owed if the parties had agreed that Gene Baxley did not owe any interest or late charges.

57. JB's inexplicable and outrageous conduct toward Gene Baxley is completely contrary to his fall 2006 agreement with Gene Baxley and has caused Gene Baxley unspeakable pain and suffering and emotional distress.

58. Further, despite JB's full knowledge of how his conduct has harmed and injured Gene Baxley, he continues to relentlessly threaten Gene Baxley with removing her from the Stonebrook Farm home and with multiple lawsuits, as well as to issue threats against the parties' mother, which has increased the burden on Gene Baxley. He has also alienated Gene Baxley's other brothers from her and their mother by his derogatory statements about Gene Baxley and their mother.

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**CLAIMS FOR RELIEF**

**AS A TWELFTH DEFENSE BY WAY OF COUNTERCLAIM**  
**(Breach of Contract)**

59. Gene Baxley incorporates herein by reference all preceding paragraphs as if fully repeated herein.

60. Under the terms of the 2006 agreement between Gene Baxley and her brother JB, JB agreed to forgive Gene Baxley of any further liability under the parties' earlier 2005 Promissory Note and to relinquish the Note in exchange for Gene Baxley's agreeing to provide home-care services to their mother, Billie B. Schwiers, for the remainder of Billie B. Schwiers's life.

61. Since 2006, Gene Baxley has fulfilled all of her obligations under the parties' 2006 agreement. Gene Baxley and her mother have lived together in the Stonebrook Farm home, and Gene Baxley has provided full-time care to her mother.

62. JB breached the 2006 agreement in the fall of 2018 when he began harassing Gene Baxley for amounts due and owing under the relinquished 2005 Promissory Note, which harassment continues to date.

63. JB's breach of the fall 2006 agreement has damaged Gene Baxley, who is now being subjected to defending a lawsuit for the balance due and owing under the 2005 Promissory Note that JB agreed to relinquish years ago, and Gene Baxley now has to relocate both her and her ailing mother who is confined to a wheelchair.

WHEREFORE, Gene Baxley respectfully prays that this Court enter judgment against JB for breach of contract in an amount to be determined at trial and for whatever further relief this Court deems just and proper at this time.

**AS A THIRTEENTH DEFENSE BY WAY OF COUNTERCLAIM**  
**(Promissory Estoppel)**

64. Gene Baxley incorporates herein by reference all of the above paragraphs as though fully set forth herein.

65. Gene Baxley's brother, JB, took affirmative actions in 2006 to allow Gene Baxley to live in the Stonebrook Farm home without the financial hardship arising from monthly payments under the 2005 Promissory Note.

66. At the time JB agreed to relinquish Gene Baxley's obligations under the terms of the 2005 Promissory Note, Gene Baxley had recently lost her lucrative employment position with MCI and could not find anything remotely equivalent to her MCI job in the Greenville, South Carolina area. JB was well informed and aware of Gene Baxley's loss of income from losing her MCI job at the time he agreed to relinquish Gene Baxley from any responsibilities she had under the parties' 2005 Promissory Note.

67. Accordingly, Gene Baxley reasonably relied on JB's unambiguous promise that she would no longer have to make monthly payments pursuant to the 2005 Promissory Note and that she agreed to be their mother's caregiver. Further, JB expected Gene Baxley to rely on his promises, and Gene Baxley's reliance was expected and foreseeable in 2006.

68. Gene Baxley has been injured as a result of JB's recent demand for payments under the former 2005 Promissory Note. She relied on JB's earlier promise and did not relocate to Greensboro, NC with her job. Instead, Gene Baxley has been taking care of their mother as agreed. Also in reliance on JB's promise that Gene Baxley did not have to make payments on the house but could live there with their mother and support her, Gene Baxley has expended enormous sums to support their mother and has depleted all her assets to do so. She now faces eviction and the expense of moving and finding suitable housing for her and her mother.

69. JB is estopped from failing to honor his 2006 promise to his sister Gene Baxley, under which he agreed to relinquish Gene Baxley's obligations under the 2005 Promissory Note, upon which promise Gene Baxley reasonably relied to her detriment and which now exposes Gene Baxley to expense and damages that JB promised would never befall upon her.

WHEREFORE, Gene Baxley respectfully prays that this Court enter judgment against JB and in favor of Gene Baxley for promissory estoppel and an order that JB is estopped from denying the duties and obligations under the parties' 2006 agreement to forever relinquish Gene Baxley from liability under the terms of the 2005 Promissory Note, and for Gene Baxley's reasonable costs and for whatever further relief the Court deems just and proper at this time.

**AS A FOURTEENTH DEFENSE BY WAY OF COUNTERCLAIM**  
**(Intentional Infliction of Emotional Distress)**

70. Gene Baxley incorporates by reference all preceding paragraphs as though fully set forth herein.

71. JB's recent aggressive and belligerent verbal attacks on Gene Baxley to harass her into making payments under the now relinquished 2005 Promissory Note, after more than 10 years of agreeing to relinquish the note, have been intentional and reckless, causing Gene Baxley to suffer severe emotional distress.

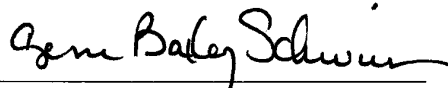
72. As a direct and proximate result of JB's aggressive and belligerent conduct directed at Gene Baxley, Gene Baxley has experienced severe emotional distress. JB's conduct has caused her to endure severe lack of sleep, suicidal thoughts, hair loss from stress, no relations with her brother which before had been very good, loss of contact with her minor nephew, and she has been required to handle the severe emotional trauma that her mother has experienced because of JB's demands for money and their eviction.

73. JB's extraordinary demands and actions toward Gene Baxley since September 2017 are outrageous and exceed the bounds of basic decency because he knows Gene Baxley relied on his promises and can no longer financially support herself and her mother since giving up her career to care for their mother in 2015. JB has also pursued outrageous conduct toward his mother, which causes Gene Baxley additional emotional distress because Gene Baxley is the only caregiver who can calm and settle her mother.

74. JB's actions toward his sister and his mother, and the resulting emotional distress experienced by Gene Baxley, is so severe that no person in her situation could be expected to endure and handle it.

WHEREFORE, Gene Baxley respectfully prays that this Court find that JB's intentional conduct caused Gene Baxley emotional distress and order JB to pay both actual and punitive damages to his sister and for whatever further relief this Court deems just and proper at this time.

Respectfully submitted,



Gene Baxley Schwiers  
4 East Cleveland Bay Court  
Greenville, SC 29615  
Telephone: (678) 770-4323

*Pro Se*

DEMAND FOR TRIAL BY JURY IS HEREBY MADE

Greenville, SC  
May 2, 2019

EXHIBIT A

**From:** JB Schwiers <[JBS@grandsouth.com](mailto:JBS@grandsouth.com)>  
**To:** Gene Baxley Schwiers ([genebaxleyschwiers@yahoo.com](mailto:genebaxleyschwiers@yahoo.com)) <[genebaxleyschwiers@yahoo.com](mailto:genebaxleyschwiers@yahoo.com)>  
**Sent:** Thursday, February 09, 2017 10:57:31 AM EST  
**Subject:** FW: Recent Home Sales Article

Gene,

Note a recent sale in your neighborhood for \$620m. Not sure where this is relative to your house. The market is still pretty good for home sales but the Fed is calling for 2 rate hikes this year. You need to think about whether or not to list your home. You might be able to get more than you owe and put some money in your pocket. It would certainly help your overall cash flow and you could focus on the beach house. That is the home you really want to keep and fix up.

JB

JB Schwiers

President & CEO

O: 864-527-7150

M: 864-630-0847  
[jbs@grandsouth.com](mailto:jbs@grandsouth.com)

NMLS# 1399610

**GrandSouth**  
**BANK**

**From:** Karen Dye  
**Sent:** Thursday, February 09, 2017 10:31 AM  
**To:** JB Schwiers  
**Subject:** Recent Home Sales Article

Karen Dye

Executive Assistant

O: 864-527-7122

M: 864-230-7101

[karen.dye@grandsouth.com](mailto:karen.dye@grandsouth.com)

**GrandSouth**  
**BANK**

**EXHIBIT B**

**From:** JB Schwiers <[JBS@grandsouth.com](mailto:JBS@grandsouth.com)>  
**To:** Gene Baxley Schwiers <[genebaxleyschwiers@yahoo.com](mailto:genebaxleyschwiers@yahoo.com)>  
**Sent:** Tuesday, April 17, 2018 09:20:35 AM EDT  
**Subject:** RE: Mauldin

I was not aware. I am interested in buying your share. What you want to do sounds like a good plan to me. We need to figure out some way to determine it's worth (fair to you and fair to me). As you know limited partners have little rights with what to do with their ownership. May need to start with asking Jim if it can be sold and if he says yes how we go about doing it. I have invested most of my liquidity in GrandSouth stock but do have a line set up to buy shares. I guess I could use that to purchase your position if necessary.

JB Schwiers

President & CEO

O: 864.527.7150

M: 864.630.0847

NMLS# 1399610

[jbs@grandsouth.com](mailto:jbs@grandsouth.com)



**From:** Gene Baxley Schwiers [<mailto:genebaxleyschwiers@yahoo.com>]  
**Sent:** Monday, April 16, 2018 6:27 PM  
**To:** JB Schwiers  
**Subject:** Mauldin

James:

As I am sure you are aware mother is battling breast cancer for the second time. She has been battling this second round of cancer since August of last year and we are in our second round of chemotherapy. The cancer this time has spread beyond the breast and into her lymph nodes. We have

been hanging on by a thread over these past months and I have been working five to six days a week to stay ahead while still applying and interviewing for positions all up and down the east coast.

I have tried everything I know keep my head above water; however, with her health expenses and everything else I am not able to survive. I have sold silver, gold, and held numerous sales. I have also attempted to sale art work; however, it still has not generated enough. It appears that all the things I have loved are of little to no value to others. I have tried Estate Sales and even Pawn Shops.

We have been hopeful that the land across the street would sale and thought we would have enough from the sale to hold on and move to the beach. However, Lidl fell through, Dollar General fell through, and now the developers have been in talks for months with no offer in hand.

Mother wants to go to the beach and live out the rest of her life. The only thing I have left to sale is my 14 percent in the partnership. I would like to know if you would be interested and willing to buy out my 14 percent.

This would allow me to pay off all debt, pay the taxes at the beach that are way over due, fix up Stone brook Farm, pay the taxes on the house, and put it on the market, place my stuff in storage, and take mother where she wants to be. I could find work locally and take care of her. I need to be able to pay the taxes at the beach as I do not want to lose the house.

I don't know what else to do. Mother does not want to be in Mauldin and I want her to be happy with what time she has left. I have taken care of her for the last 20 years and want the last part of her life to have some joy. I also want out of Stonebrook Farm and want to be able to sale the house and give you back what is owed.

I am willing to sign whatever you may need to ensure that you know I am sincere. I have already packed most of my house and have been working on Mothers.

Let me know if we can discuss.

GBS

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
James Bennett Schwiers,	)	
	)	<b>REPLY TO COUNTERCLAIM</b>
Plaintiff,	)	
	)	<b>2019-CP-23-00049</b>
vs.	)	
	)	
Gene Baxley Schwiers,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff, James Bennett Schwiers, replying to the Counterclaim of the Defendant, would respectfully show the Court as follows:

**FOR A FIRST DEFENSE**  
**(General Denial)**

1. Plaintiff reasserts, realleges, and incorporates all of the allegations set forth in his Complaint as if fully set forth herein.
2. Plaintiff admits the allegations of Paragraph 32.
3. Plaintiff admits the allegations of Paragraph 33.
4. Plaintiff admits the allegations of Paragraph 34.
5. Plaintiff admits the allegation of Paragraph 35.
6. Plaintiff admits so much of the allegations of Paragraph 36 as alleges that Defendant moved from Atlanta to Greenville on or around 2003. Plaintiff lacks sufficient information or belief as to the remaining allegations set forth in Paragraph 36 and, therefore, denies the same.

7. In answering Paragraph 37, Plaintiff admits that Defendant was considering the purchase of a home in Fountain Inn, SC, but Plaintiff lacks sufficient information or belief as to the remaining allegations of Paragraph 37 and, therefore, denies the same.

8. Plaintiff denies the allegations of Paragraph 38 as stated.

9. Plaintiff denies the allegations of Paragraph 39 as stated. Further answering the allegations of Paragraph 39, Plaintiff would show the Court that he opposed the purchase of the subject property because the house was more than what was reasonably necessary for the Defendant to purchase and/or could afford and he encouraged the Defendant to find a house that was more economically reasonable. Plaintiff would further show the Court that he was pressured by his mother to provide financing to the Defendant for the purchase of the house and was assured by both Defendant and their mother that he would not suffer any loss in the event of non-payment.

10. Plaintiff denies the allegations of Paragraph 40 as stated. Further answering the allegations of Paragraph 40, Plaintiff would show the Court that relying upon the representations of both the Defendant and their mother that he would not suffer any loss, Plaintiff agreed to finance the purchase price of the house for the Defendant in accordance with and under the terms of that certain Promissory Note and Mortgage which is the subject matter of this action.

11. Plaintiff admits the allegations of Paragraph 41 upon information and belief.

12. Plaintiff admits so much of the allegations of Paragraph 42 as allege that some payments were made by Defendant and that she lost her job with MCI.

13. Plaintiff denies the allegations of Paragraph 43.

14. Plaintiff admits so much of the allegations of Paragraph 44 as allege that he lives on property owned by the Billie Gene Baxley Schwiers, Limited Partnership. Further answering the allegations of Paragraph 44, Plaintiff would show the Court that he is both a general partner

and limited partner of the Limited Partnership and that at all times he has maintained the subject property at no expense to the Limited Partnership, including the payment of property taxes. The remaining allegations of Paragraph 44 are denied.

15. The allegations of Paragraph 45 are denied.

16. The allegations of Paragraph 46 are denied.

17. Plaintiff admits the allegations of Paragraph 47 upon information and belief.

18. In answering Paragraph 48, the Plaintiff admits upon information and belief that the Defendant was employed by The Fresh Market, but the Plaintiff denies all remaining allegations of Paragraph 48. Further answering the allegations of Paragraph 48, the Plaintiff would show the Court that since the execution and delivery of the Promissory Note and Mortgage that is the subject of this action, Defendant has acted recklessly with her financial affairs. The Defendant has ignored her financial obligations due and owing to the Plaintiff and has spent money frivolously on consumables rather than making the mortgage payments to Plaintiff. Plaintiff repeatedly encouraged Defendant to sell the subject property and move to the beach with their mother in a house owned by their mother and worth in excess of One Million and no/100 Dollars (\$1,000,000.00) in an effort to relieve the Defendant of her financial burdens; however, she adamantly refused and continued her reckless spending and ignoring her obligations due and owing on the Promissory Note and Mortgage.

19. The allegations of Paragraph 49 are denied.

20. Plaintiff admits so much of the allegations of Paragraph 50 as allege that Defendant has always acknowledged her obligation to the Plaintiff on the Promissory Note and Mortgage and has never disputed her obligation to pay the debt in full.

21. Plaintiff admits so much of the allegations of Paragraph 51 as allege that Plaintiff continually encouraged the Defendant to sell the house to relieve her of her financial distress.

22. Plaintiff denies the allegations of Paragraph 52.

23. Plaintiff denies the allegations of Paragraph 53.

24. Plaintiff admits so much of the allegations of Paragraph 54 as allege that Defendant has provided care to his mother. The remaining allegations of Paragraph 54 are denied.

25. Plaintiff denies the allegations of Paragraph 55. In further response, Plaintiff craves reference to the email attached to the Counterclaim as Exhibit A and denies any allegations in Paragraph 55 that are inconsistent therewith.

26. Plaintiff denies the allegations of Paragraph 56 and craves reference to the email attached to the Counterclaim as Exhibit B and denies any allegations in Paragraph 56 that are inconsistent therewith. Further answering the allegations in Paragraph 56, Plaintiff admits that he continually and repeatedly attempted to get Defendant to sell the house but she has failed and refused to do so.

27. Plaintiff denies the allegations of Paragraph 57.

28. Plaintiff denies the allegations of Paragraph 58.

29. Paragraph 59 of the Counterclaim is an incorporation paragraph to which no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 59.

30. Plaintiff denies the allegations of Paragraph 60.

31. Plaintiff denies the allegations of Paragraph 61.

32. Plaintiff denies the allegations of Paragraph 62.

33. Plaintiff denies the allegations of Paragraph 63

34. Plaintiff denies the prayer for relief contained in the unnumbered paragraph commencing with “WHEREFORE” following paragraph 63 of the Counterclaim.

35. Paragraph 64 of the Counterclaim is an incorporation paragraph to which no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 64.

36. Plaintiff denies the allegations of Paragraph 65.

37. Plaintiff denies the allegations of Paragraph 66.

38. Plaintiff denies the allegations of Paragraph 67.

39. Plaintiff denies the allegations of Paragraph 68.

40. Plaintiff denies the allegations of Paragraph 69.

41. Plaintiff denies the prayer for relief contained in the unnumbered paragraph commencing with “WHEREFORE” following paragraph 69 of the Counterclaim.

42. Paragraph 70 of the Counterclaim is an incorporation paragraph to which no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 70.

43. Plaintiff denies the allegations of Paragraph 71.

44. Plaintiff denies the allegations of Paragraph 72.

45. Plaintiff denies the allegations of Paragraph 73.

46. Plaintiff denies the allegations of Paragraph 74.

47. Plaintiff denies the prayer for relief contained in the unnumbered paragraph commencing with “WHEREFORE” following paragraph 74 of the Counterclaim.

48. Plaintiff denies each and every allegation of the Counterclaim not expressly admitted.

**FOR A SECOND DEFENSE**  
**(Failure to State a Claim)**

49. Plaintiff realleges and incorporates the allegations set forth above to the extent they are consistent with this defense.

50. The Counterclaim fails to set forth claims upon which relief can be granted.

**FOR A THIRD DEFENSE**  
**(Waiver, Estoppel, Laches, Unclean Hands)**

51. Plaintiff realleges and incorporates the allegations set forth above to the extent they are consistent with this defense.

52. The Counterclaim is barred, in whole or in part, by the doctrines of waiver, estoppel, laches, and/or unclean hands.

**FOR A FOURTH DEFENSE**  
**(Affirmative Defenses)**

53. Plaintiff realleges and incorporates the allegations set forth above to the extent they are consistent with this defense.

54. Plaintiff raises each and every affirmative defense which is required to be set forth in his Reply to the Counterclaim pursuant to SCRCP 8(c), reserving unto himself the right to amend his pleadings to set forth with specificity the basis for such defenses which may appear appropriate as a result of the evidence and legal principals involved which show the same to be applicable. Plaintiff has insufficient knowledge and information upon which to form a belief as to whether he may have additional, as yet unstated, separate defenses available. Plaintiff reserves the right to assert further defenses in the event that he determines that such defenses are appropriate.

WHEREFORE, Plaintiff prays:

- (1) For an order dismissing the Defendant's Counterclaim against the Plaintiff with prejudice and declaring that the she is entitled to no recovery against the Plaintiff;

- (2) That Plaintiff's Mortgage be declared a lien on the subject property;
- (3) That Plaintiff have judgment against the mortgaged premises for the sum of Seven Hundred Ninety-one Thousand Six Hundred Forty-four and 14/100 Dollars (\$791,644.14) with interest from December 7, 2018 at the rate set forth in the subject Note; together with attorney's fees, necessary payment of taxes, insurance, and/or advancements; and for the cost of this action;
- (4) That the mortgaged premises and collateral be sold, any equity of redemption barred, and that Plaintiff be granted a deficiency judgment against Defendant, Gene Baxley Schwiers, for any deficiency remaining after the application of the proceeds of sale to the amount of judgment; and
- (5) For such other and further relief as the Court deems just and proper.

**ROE CASSIDY COATES & PRICE, P.A.**

/s/James H. Cassidy

James H. Cassidy, SC No. 1160

[jcassidy@roecassidy.com](mailto:jcassidy@roecassidy.com)

Ella S. Barbery, SC No. 70677

[ebarbery@roecassidy.com](mailto:ebarbery@roecassidy.com)

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Greenville, SC 29603

(864) 349-2600

*Attorneys for Plaintiff*

Greenville, South Carolina

Date: May 29, 2019

STATE OF SOUTH CAROLINA )

COUNTY OF GREENVILLE )

COURT OF COMMON PLEAS  
2019-CP-23-00049

JAMES B. SCHWIERS,  
PLAINTIFF, )

vs. )

GENE B. SCHWIERS,  
DEFENDANT. )

TRANSCRIPT OF RECORD

**ORIGINAL**

November 18, 2019  
Greenville, South Carolina

B E F O R E:

THE HONORABLE ROBIN B. STILWELL, JUDGE.

A P P E A R A N C E S:

JAMES H. CASSIDY, ESQ.  
Attorney for the Plaintiff

BURL F. WILLIAMS, ESQ.  
Attorney for the Defendant

HOLLIE M. JENKINS  
Circuit Court Reporter

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits introduced.)

P R O C E E D I N G S

1  
2 THE COURT: Okay. So the next case up is Schwiers v.  
3 Schwiers. And this is case 2019-CP-23-49. It appears to be  
4 a motion for reference.

5 Is it the Plaintiff's motion?

6 MR. CASSIDY: Yes, sir.

7 THE COURT: Okay. Yes, sir. I'll be glad to hear  
8 from you.

9 MR. CASSIDY: Good afternoon.

10 THE COURT: Good afternoon.

11 MR. CASSIDY: Your Honor, I represent J.B. Schwiers  
12 in an unfortunate family dispute. Mr. Schwiers --

13 THE COURT: So just let me say that I -- I know  
14 Mr. Schwiers. I -- I don't know Mr. Schwiers very well.  
15 But we happen to be Citadel graduates. Of course, as you  
16 are well aware, Mr. Cassidy, it's a large family. But I  
17 just -- I do want to put that on the record that I know  
18 J.B. And I have done business with him and have -- have  
19 procured loans from several of the banks at which he  
20 works, but.

21 So I want to make that clear to you. I -- it -- it  
22 won't affect my -- my ruling in this case one way or the  
23 other, particularly inasmuch it's a motion for reference  
24 and it's not dispositive. But I -- I give you the  
25 opportunity to make a motion for me to recuse myself, if

1 you want to.

2 MR. WILLIAMS: Your Honor, thank you for bringing  
3 that to light.

4 Burl Williams, Counsel for Gene Schwiers. We -- we  
5 do not need to ask the Court to recuse. We're happy to  
6 have you hear this motion.

7 THE COURT: Okay. Yeah. That's good. Because  
8 Schwiers has charged me a lot of interest over the years.  
9 So it cuts both ways --

10 MR. WILLIAMS: You can get some due back.

11 THE COURT: That's right.

12 Yes, sir.

13 MR. CASSIDY: Your Honor, the essence of this case is  
14 a foreclosure. My client loaned his sister \$526,322.89 to  
15 purchase a home in the Stonebrook subdivision. There's no  
16 question about the execution and delivery of the note and  
17 the mortgage. And there's no question that there's  
18 nonpayment.

19 The Defense to this case, essentially, is that there  
20 are -- subsequent to the execution and delivery of the  
21 note and the mortgage, the parties entered into an alleged  
22 oral agreement whereby -- and I'm a little unclear exactly  
23 what Ms. Schwiers is saying is the agreement, whether the  
24 entire debt was forgiven, or whether the interest was  
25 forgiven in consideration for Gene Schwiers taking care of

1 their mother who has been ill over the last several years.

2 The Court -- the Supreme Court has held -- the remedy  
3 that they're, actually, seeking is specific performance,  
4 or a cancellation of the debt, or somehow he only has to  
5 pay -- or she only has to pay the principle amount. In  
6 Ingram v. Kasey's Associates, the Supreme Court held that  
7 specific performance is an equitable proceeding.

8 So as it relates to the first defense -- or the  
9 defense and counterclaim, specific performance is not an  
10 equitable action. And, of course, foreclosure is an  
11 equitable action.

12 Their second counterclaim is for promissory estoppel.  
13 Again, an equitable defense saying you should be estopped  
14 from accelerating on the note because of this alleged  
15 promise. It's -- it's a little hard to get around what  
16 she's claiming. Because if you look at her answer,  
17 particularly in paragraph 50, she states in her answer  
18 that she always intended to repay the principle of the  
19 loan.

20 And, again, in paragraph 56 of the answer, she sent  
21 him an e-mail that says. It's my intention to sell the  
22 house and pay you everything you're owed. So it's a  
23 little difficult to understand where they're coming from  
24 as to those -- that cause of action.

25 The third counterclaim is intentional infliction of

1        mental distress. And the basis for that is this agreement  
2        that allegedly took place. She's alleging that he's using  
3        the foreclosure action to leverage some kind of agreement  
4        where he can get control of a family limited partnership.  
5        The family limited partnership has nothing to do with this  
6        foreclosure whatsoever.

7                His mother set up a family limited partnership on  
8        some commercial property on Mauldin Road. His mother and  
9        J.B. are the general partners. And the siblings,  
10       including J.B., are the limited partners. And the limited  
11       partners have had no control over a family limited  
12       partnership.

13               So even if there was some alleged attempt to gain  
14       control of the family limited partnership, that has  
15       nothing to do with this foreclosure. And it would be a  
16       separate claim that the family limited partnership might  
17       assert against him. And it, certainly, at the very least,  
18       would be severable from this action. But, more  
19       importantly, it's a permissive counterclaim.

20               And in Johnson v. South Carolina National Bank, the  
21       Court held that the Defendant waives his right to a jury  
22       trial by asserting a permissive counterclaim in an  
23       equitable action such as this foreclosure.

24               So for those reasons, Your Honor, we believe that  
25       it's proper to have this matter referred to the master.

1 THE COURT: Okay. So is the -- the Plaintiff's cause  
2 of action a foreclosure of a note and mortgage?

3 MR. CASSIDY: Yes, sir.

4 THE COURT: Okay. Good enough.

5 Okay. Yes, sir, Mr. Williams.

6 MR. WILLIAMS: Good afternoon, Your Honor.

7 Last Friday, I filed a memo in opposition.

8 THE COURT: Yes, sir.

9 MR. WILLIAMS: Do you have that?

10 THE COURT: Let's see here. Memo in opposition to  
11 order for reference. I have it right here.

12 MR. WILLIAMS: Okay.

13 THE COURT: I just pulled it up.

14 MR. WILLIAMS: So the key -- the key issues are we've  
15 got some pretty straightforward law in South Carolina  
16 about what to do in this situation. If you have a legal  
17 compulsory counterclaim, then you try it to a jury and you  
18 do it first. And you put the foreclosure issue second.

19 That is North Carolina Federal Savings and Loan  
20 Association against DAV, Corp., 298 S.C. 514, and --  
21 Plantation Federal Bank against Gray, 401 S.C. 507.

22 In 2006, a year after this note was provided by  
23 Mr. Schwiers, he forgave it. He forgave Gene's obligation  
24 to make any payments on it. Over the last 12 years, she's  
25 made no payments on it. He's never -- he's never filed

1 anything. And the evidence is going to show that she  
2 didn't make payments for 12 years. And the foreclosure  
3 action didn't start until 2019 because that was the deal.  
4 The deal was take care of mother and I'll forgive your  
5 obligation to make payments.

6 Now, the question about, well, what about the -- the  
7 note? The testimony will be, well, if she ever sold the  
8 house, then she'll pay the money back on the note, what he  
9 provided.

10 But what prompted this and really what the  
11 intentional inflection of emotional distress counterclaim  
12 is about is this all came about during squabbles about  
13 who's going to control a farm in Mauldin. There's 89  
14 acres in Mauldin. Mr. Schwiens lives on it, but he only  
15 owns 13.5 percent of the limited partnership. And so we  
16 submit that's -- this case is an effort to leverage them  
17 to sell their 60.5 percent interest. Them includes the  
18 [inaudible].

19 And so we've got -- you know, we've alleged  
20 counterclaims. They're legal. They are compulsory. And  
21 they're compulsory because the basis for the counterclaims  
22 is -- is the claim and the badgering to begin paying on a  
23 note that he forgave, which is the basis for the  
24 foreclosure action.

25 The North Carolina Federal Savings and Loan case,

1 Your Honor --

2 THE COURT: Yes, sir.

3 MR. WILLIAMS: -- it says, The -- to the question of  
4 whether a counterclaim is compulsory or permissive, is  
5 there any logical relationship between the claim and the  
6 counterclaim? Of course, here, the answer to that is,  
7 yes.

8 So we'd ask Your Honor to, I guess, do one of two  
9 things. One, set this case for a jury trial and rule that  
10 the foreclosure comes second; or, two, somehow allow us to  
11 do them together and let whatever Judge presides resolve  
12 the equitable issues and a jury resolve the legal issues.

13 THE COURT: Okay. Thank you.

14 MR. WILLIAMS: Yes, sir.

15 THE COURT: Mr. Cassidy, would you like to respond?

16 MR. CASSIDY: Your Honor, I -- I, too, filed a brief.  
17 I think you have a copy of it. And I cited the -- the  
18 Carolina First v. BADD.

19 The allegations about this intentional infliction of  
20 emotional distress has nothing to do with the foreclosure.  
21 The question is whether or not the note and the mortgage  
22 is enforceable. And the -- the remedy that they're  
23 seeking is a cancellation of the debt. They acknowledge  
24 that they signed the note and the mortgage.

25 So the only relief they can get is the cancellation

1 of the debt, which is a specific performance claim, which  
2 is an equitable action. And I've cited the cases in there  
3 that say that this is not a compulsory counterclaim. It's  
4 a permissible one, at best.

5 But even though -- because they raised it in this  
6 action. They've waived their right to a jury trial on  
7 that claim.

8 THE COURT: Okay. Thank you.

9 Well, here -- here's the deal, you know. I -- I'm  
10 going to look at it. And I'll look at both of your  
11 briefs. And all the law that y'all have recited on both  
12 sides is good law.

13 I do know that with the -- financial crisis of 2008  
14 and 2009, with all of the foreclosure actions that came  
15 before the Court, there was a lot of litigation that went  
16 to the Supreme Court that discussed this very issue. And  
17 that is, under what circumstances did a defendant have a  
18 right to a jury trial on a legal cause of action?

19 And the reason for that was very practical, and that  
20 was people were bringing a lot of spurious counterclaims  
21 alleging that they had a right to a jury trial. It was  
22 just delaying these foreclosure proceedings. And the  
23 Supreme Court, essentially, said -- and I'm  
24 paraphrasing -- that if you bring that permissive  
25 counterclaim -- if you bring that permissive counterclaim

1 in a foreclosure action, then you, essentially, have  
2 merged it into the non-jury action for equitable relief.

3 Now, this action may be distinguishable. I don't  
4 know. I haven't determined that yet. Because this is a  
5 little bit different than your garden variety foreclosure  
6 where a lender lends money to a -- a customer and then  
7 brings a foreclosure action on a failure to pay. This --  
8 this one is a little bit more nuance than that.

9 So I'm going to read your briefs. Then I'm going to  
10 go back and look at those specific cases that came down  
11 from the Supreme Court in the 2012, '13, '14 time frame  
12 where the Supreme Court was really struggling with this  
13 because of the matters -- very practical matters of  
14 judicial economy. We'll see if it fits into that category  
15 of cases. I suspect it might.

16 But this, also, seems like one of those cases where  
17 both sides really have a very strong personal interest in  
18 just resolving the outstanding disputes and not vetting  
19 their dirty laundry on public record. That's what it  
20 seems like to me. But things surprise me all the time.

21 MR. CASSTDY: I think you've got it right, Judge.

22 THE COURT: All right. So I'll take a look at it.  
23 And I'll -- I'll rule by the end of the week.

24 All right. Thank you. I appreciate it.

25 \*\*\*\*\*END OF TRANSCRIPT OF RECORD\*\*\*\*\*

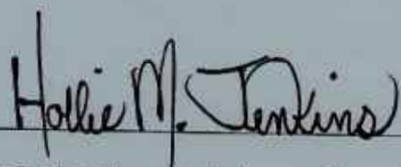
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA            )  
COUNTY OF GREENVILLE            )

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 16th day of March, 2020.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

March 16, 2020

  
\_\_\_\_\_  
Hollie M. Jenkins, Court Reporter

My Commission Expires: 09/24/20

Certificate of Counsel

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The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

September 30, 2019

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