

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2020-CP-10-2044

RECEIVED
Oct 14 2020
SC Court of Appeals

City National Bank of West
Virginia,

Respondent,

v.

Jay F. Rutherford, Jr., Kitric
W. Rutherford, The
Rutherford Group, LLC, Jay
F. Rutherford, Sr.,

Appellants.

Motion to Reinstate with Memorandum

Pursuant to Rule 240, SCACR, Appellants Move to Reinstate their Appeal. This Appeal was dismissed by an action of the court without motion from the parties on October 1, 2020. The reason given for the *sua sponte* dismissal is, “Because the underlying order is not immediately appealable, this appeal is dismissed. See N. Carolina Fed. Sav. & Loan Ass’n v. Twin States Dev. Corp., 289 S.C. 480, 481, 347 S.E.2d 97, 97 (1986)(holding an order of reference in an action to foreclose a mortgage is not subject to an immediate appeal)” The Circuit Court case giving rise to this appeal was brought by the respondent with four distinct causes of action: (1) Suit to obtain a judgment on two notes against The Rutherford Group, LLC (2) Foreclosure against Jay Rutherford, Jr. and

Rutherford Motion to Reinstate0001

Kitric Rutherford against property they own in South Carolina, and (3) Collection on Guaranties against Jay Rutherford Jr. and Jay Rutherford, Sr. A Copy of the complaint without exhibits is attached as Exhibit “1.” Appellants filed an answer to the Complaint asserting their right to a jury trial. Respondents filed a Proposed Order of Reference to the Master in Equity which was signed without a hearing.

Appellants filed their Notice of Appeal in this matter on September 23 on the grounds that the Order for Reference to Master in Equity denies the Appellants their right to a jury trial.

In this case, the Appellants assert their right to a jury trial with the answer so the transfer to the Master in Equity of the entire action deprives them of the right to a mode of trial to which they are entitled. Orders affecting the mode of trial affect substantial rights and must be appealed immediately. Lester v. Dawson, 491 S.C. 240, 266, 491 S.E.2d 240. If the Appellants did not appeal this order now and later tried to re-assert their right to a jury trial, they would be found to have waived it.

When a case involves legal and equitable issues, there exists a right to a jury trial on the legal issues. *see* Time Warner Cable v. Condo Services, Inc 381 S.C. 275, 672 S.E.2d 816 (2009); *see* Johnson v. SC National Bank, 354 S.E.2d. 895, 292 SC 51, 53 (1987), *citing* C & S Real Estate Services v. Massengale, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986). The judge then has two options. “He may either order separate trials pursuant to rule 42(b) or may order the claims tried in a single proceeding.” Johnson at 55. However, the judge must ensure that, “a joint trial will not deprive a party of his right to a full jury trial of legal issues.” Id. In this case, the Court ordered the actions to be tried by the Master in Equity, who sits without a jury.

Rule 53(b) SCRCF governs references to masters in equity and how jury demands are to be handled. It states:

In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case. Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court....

The parties did not consent to the reference and this is not a default case. Neither is this truly an action for foreclosure; the plaintiff chose to sue simultaneously for a suit on a note, foreclosure, and for collection on a guaranty. Rule 53 cannot be read to allow the violation of the right to a jury trial just because the plaintiff bundled a foreclosure with legal causes of action. Both the actions against Rutherford Group, LLC and Jay Rutherford, Sr. would be not properly referable unless there is consent or a default. The Respondent is seeking a money judgement against The Rutherford Group, LLC and against Jay Rutherford, Sr. If these causes of action were brought without the addition of the foreclosure actions against Jay Rutherford, Jr. and Kitric Rutherford there would be no question.

Furthermore, Rule 53 sets up a procedure that once a jury demand is made, “the matter **shall** be returned to the circuit court.” (emphasis added) This is a definite command. It stands to reason that if the demand has been made then this same language bars a subsequent reference without consent as an action void *ab initio*.

Finally, when legal and equitable issues co-exist in the same action, “the legal issues must be determined first, and the findings of the jury are binding on the sitting

judge as trier of the equitable claims.” Id. The reference is premature and should not take place until after the jury issues are decided. Allowing the foreclosure to proceed first violates this principle.

WHEREFORE Appellants request that this Court Reinstate the Appellant’s Appeal.

THE FRENCH LAW FIRM, LLC

October 14, 2020

/s/Shawn M. French, Sr.
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EXHIBIT "1"

ELECTRONICALLY FILED - 2020 May 04 9:39 AM - CHARLESTON - COMMON PLEAS - CASE#2020CP1002044

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

City National Bank of West Virginia,) Civil Action No. 2020-CP-10-
)
) Plaintiff,)

vs.)

SUMMONS
(Non-Jury)

Jay F. Rutherford, Jr., Kitric W.)
Rutherford; The Rutherford Group,)
LLC; and Jay F. Rutherford, Sr.,)
)
Defendants.)

TO: THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Complaint upon the subscribers at 1320 Main Street, Post Office Box 11070, Columbia, South Carolina 29211, within thirty (30) days after service hereof except as to the United States of America, which shall have sixty (60) days, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

YOU WILL ALSO TAKE NOTICE that pursuant to Rule 53(b), of the South Carolina Rules of Civil Procedure, as amended effective September 1, 2002, the Plaintiff will move for a general Order of Reference to the Master in Equity for Charleston County, which Order shall, pursuant to Rule 53(b) of the SCRCPP, specifically provide that the said Master in Equity is authorized and empowered to enter a final judgment in this action.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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**ATTORNEYS FOR CITY NATIONAL BANK OF WEST
VIRGINIA**

Columbia, South Carolina

April 30, 2020

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

City National Bank of West Virginia,) Civil Action No. 2020-CP-10-
)
) Plaintiff,)

COMPLAINT

vs.)

**Foreclosure/Collection on
Guaranty/Reformation of
Mortgage/Receiver**

Jay F. Rutherford, Jr., Kitric W.)
Rutherford; The Rutherford Group,)
LLC; and Jay F. Rutherford, Sr.,)
)
Defendants.)

**Judgment Demanded Pursuant to
S.C. Code § 29-3-650
(Non-Jury)**

The Plaintiff above-named, complaining of the Defendants herein, would respectfully show:

1. Plaintiff City National Bank of West Virginia ("Plaintiff") is a banking corporation organized and existing under and pursuant to the laws of the United States.
2. Upon information and belief, the Defendant Jay F. Rutherford, Jr. is a citizen and resident of Fayette County, State of Kentucky ("Jay Rutherford, Jr.").
3. Upon information and belief, the Defendant Kitric W. Rutherford is a citizen and resident of Fayette County, State of Kentucky ("Kitric Rutherford").
4. Upon information and belief, the Defendant The Rutherford Group, LLC is a limited liability company organized and existing pursuant to the laws of the State of Kentucky ("Rutherford Group").
5. Upon information and belief, the Defendant Jay F. Rutherford, Jr. is a citizen and resident of Fayette County, State of Kentucky ("Jay Rutherford, Sr.").

6. Any defendant described herein as a judgment creditor has, by filing the judgment, designated the attorney entering the judgment as its agent for service of process pursuant to the provisions of Section 15-35-840 of the S.C. Code of Law (1976) as amended.

7. This Court has jurisdiction over this matter and the parties.

8. The real property which is the subject of the within mortgage foreclosure action is located in Charleston County, South Carolina and venue is proper in this Court.

9. With the formal discontinuance of the Home Affordable Modification Program (HMP) on December 31, 2016, South Carolina Administrative Order 2009-05-22-01 has expired by operation of law and is no longer applicable.

10. Pursuant to South Carolina Supreme Court's Administrative Order filed on May 2, 2011, (2011-03-02-01) the real property involved herein is not an "owner-occupied dwelling" as defined in the Order. As such, this Administrative Order does not apply to this foreclosure.

11. Pursuant to South Carolina Supreme Court's Administrative Order filed on April 30, 2020 (2020-04-30-02), the Court has placed a moratorium on all foreclosure hearings and sales until May 15, 2020. However, said moratorium does not preclude new foreclosure suits from being filed until such time as hearings and sales proceed. As such, Plaintiff is in compliance with this Administrative Order.

12. This is not a residential foreclosure of a federally backed 1-4 family mortgage loan; therefore, the provisions of Section 4022 of the Coronavirus Aid, and Relief and Economic Security Act of 2020 (the "CARES Act") do not apply.

FOR A FIRST CAUSE OF ACTION
(Foreclosure – Note/Mortgage)

13. Each and every allegation in the above-numbered paragraphs is repeated herein as if stated verbatim.

14. On or about June 15, 2016, Rutherford Group executed a Construction Loan Agreement ("Loan Agreement"). A copy of the Loan Agreement is attached hereto as **Exhibit A**.

15. On or about June 15, 2016, the Defendant Rutherford Group for value received, executed and delivered to Plaintiff a promissory note in the principal sum of Six Hundred Ninety-Six Thousand and 00/100 (\$696,000.00) Dollars, with interest thereon, the terms of which note are more fully explained by reference thereto ("Note A"), a true and correct copy of which is attached hereto as **Exhibit B** and incorporated herein by reference.

16. On or about June 15, 2016, the Defendant Rutherford Group for value received, executed and delivered to Plaintiff a promissory note in the principal sum of Four Hundred Thousand and 00/100 (\$400,000.00) Dollars, with interest thereon, the terms of which note are more fully explained by reference thereto ("Note B"), a true and correct copy of which is attached hereto as **Exhibit C** and incorporated herein by reference.

17. On or about September 26, 2016, the Defendant Rutherford Group for value received, executed and delivered to Plaintiff a promissory note in the principal sum of One Million One Hundred Fifty-Five Thousand One Hundred Four and 00/100 (\$1,155,104.00) Dollars, with interest thereon, the terms of which note are more fully explained by reference thereto ("Note C").

18. In order to secure the payment of Note C, the Defendants Jay Rutherford, Jr. and Kitric Rutherford executed and delivered to the Plaintiff that certain Mortgage (hereinafter "Mortgage") dated January 23, 2018, and recorded in the Office of the Register of Deeds for Charleston County on January 31, 2018, in Mortgage Book 0695 at Page 646, wherein and

whereby said Defendants mortgaged to Plaintiff the following real property more fully described herein as follows:

All that certain piece, parcel or lot of land, with the buildings and improvements thereon, situate, lying and being in the County of Charleston, State aforesaid, and known and designated as Unit 1094 on a plat of Coastal Surveying Co. Inc., dated August 12, 1977, having latest revisions dated August 11, 1997, entitled "Plat of a Portion of Sparrow Pond Cottages Located on Kiawah Island, Charleston County, South Carolina, owned by Kiawah Island Company, Inc., 67 Broad Street, Charleston, S.C. 29401" recorded in Plat Book AJ at Page 83 in the R.M.C. Office for Charleston County, S.C., and having such location, buttings, boundings, dimensions, course and distances as will by reference to said plat more fully appear.

Subject to any and all Restrictions, Covenants, Conditions, Easements, Rights of Way and all other matters affecting subject property of record in the Office of the RMC for Charleston County, South Carolina.

This being the same property conveyed to Jay F. Rutherford, Jr. and Kitric W. Rutherford by deed of Jay F. Rutherford, Trustee of the Jay F. Rutherford Revocable Trust Agreement Dated May 2, 2005, by deed recorded in the Office of the Register of Deeds for Charleston County on July 11, 2016 in Book 0567 at Page 308.

TMS No. 207-06-00-121

Property Address: 1094 Diodia Court, Kiawah Island, SC 29455

Hereafter referred to as the "Real Property." A true and correct copy of said Mortgage is attached hereto as **Exhibit D** and incorporated herein by reference.

19. In order to further secure the payment of Note C, the Defendants Jay Rutherford, Jr. and Kitric Rutherford executed and delivered to the Plaintiff that certain Assignment and Rents, dated January 23, 2018 ("Assignment"), wherein and whereby Jay Rutherford, Jr. and Kitric Rutherford assigned their interest in the leases and rents from the Real Property to the Plaintiff as set forth therein. The Assignment was recorded in the Office of the Register of Deeds for Charleston County on January 31, 2018 in Book 0695 at Page 647. A true and correct copy of said Assignment as recorded in Charleston County is attached hereto as **Exhibit E** and is incorporated herein by reference.

20. Note C was modified on January 23, 2018 by that certain Change in Terms Agreement (“Amendment”), which, among other things, cross-collateralized and cross-defaulted Note A and Note B with Note C. A true and correct copy of said Amendment is attached hereto as **Exhibit F** and incorporated herein by reference.

21. Note C was subsequently paid in full, however, due to the cross-collateralization and cross-default provision in the Amendment, Note A and Note B are secured by the Real Property encumbered by the Mortgage.

22. The Plaintiff is the owner and holder of the Loan Agreement, Note A, Note B, Mortgage and Assignment.

23. The Defendant Rutherford Group has defaulted in the payment of the Note A given to Plaintiff by failing to pay Plaintiff, on demand, the principal and interest due under Note A, and all interest due thereon. Note A is therefore in default and Plaintiff has declared and hereby declares the entire balance owing on Note A to be immediately due and payable.

24. The Defendant Rutherford Group has defaulted in the payment of the Note B given to Plaintiff by failing to pay Plaintiff, on demand, the principal and interest due under Note B, and all interest due thereon. Note B is therefore in default and Plaintiff has declared and hereby declares the entire balance owing on Note B to be immediately due and payable.

25. The Mortgage is a valid first lien on the Real Property.

26. The Plaintiff reserves all rights to all other collateral that secures Note A and Note B.

27. There is due and unpaid on Note A, as secured by the Mortgage, as of April 27, 2020, the principal sum of Six Hundred Twenty-Two Thousand Nine Hundred Twenty-Nine and 62/100 (\$622,929.62) Dollars, plus interest in the amount of Thirty-Two Thousand Two

Hundred Sixty Seven and 56/100 (\$32,267.56) Dollars, plus late charges in the amount of Five Thousand Seven Hundred Eighty-Three and 14/100 (\$5,783.14) Dollars, plus repayment penalties in the amount of Twelve Thousand Four Hundred Fifty-Eight and 59/100 (\$12,458.59). Demand has been made upon the Defendant Rutherford Group to pay said amounts but said Defendant has refused to pay the same, or any part thereof, and said refusal is continuing, all to Plaintiff's injury and damage in the sum of Six Hundred Seventy-Three Thousand Four Hundred Thirty-Eight and 91/100 (\$673,438.91) Dollars, plus interest thereon, plus reasonable attorney's fees and the costs and expenses of this action.

28. Plaintiff hereby expressly seeks a judgment against the Defendant Rutherford Group pursuant to S.C. Code Ann. § 29-3-650 for the full amount due under Note A in the amount of Six Hundred Seventy-Three Thousand Four Hundred Thirty-Eight and 91/100 (\$673,438.91) Dollars as of April 27, 2020, plus ongoing interest thereon, plus reasonable attorney's fees and the costs and expenses of this action.

29. There is due and unpaid on Note B, as secured by the Mortgage, as of April 27, 2020, the principal sum of Two Hundred Twenty-Four Thousand Eight Hundred Forty-Eight and 74/100 (\$224,848.74) Dollars, plus interest in the amount of Six Thousand Nine Hundred Fifty-Four and 70/100 (\$6,954.70) Dollars, plus late charges in the amount of Three Hundred Fifteen and 80/100 (\$315.80) Dollars, plus prepayment penalties in the amount of Four Thousand Four Hundred Ninety-Six and 97/100 (\$4,496.97) Dollars. Demand has been made upon the Defendant Rutherford Group to pay said amounts but said Defendant has refused to pay the same, or any part thereof, and said refusal is continuing, all to Plaintiff's injury and damage in the sum of Two Hundred Thirty-Six Thousand Six Hundred Sixteen and 21/100 (\$236,616.21)

Dollars, plus interest thereon, plus reasonable attorney's fees and the costs and expenses of this action.

30. Plaintiff hereby expressly seeks a judgment against the Defendant Rutherford Group pursuant to S.C. Code Ann. § 29-3-650 for the full amount due under Note B in the amount of Two Hundred Thirty-Six Thousand Six Hundred Sixteen and 21/100 (\$236,616.21) Dollars as of April 27, 2020, plus ongoing interest thereon, plus reasonable attorney's fees and the costs and expenses of this action.

31. The Plaintiff also hereby expressly seeks the foreclosure and sale of the Real Property pursuant to S.C. Code Ann. § 29-3-650. The judgment entered against Rutherford Group shall be credited by the amount of the high bid entered at any subsequent foreclosure sale of the Real Property, as provided in the statute. Plaintiff reserves the right to any deficiency judgment as to Defendant Rutherford Group after crediting the bid.

FOR A SECOND CAUSE OF ACTION
(Collection on Guaranty)

32. Each and every allegation in the above-numbered paragraphs is repeated herein as if stated verbatim.

33. In consideration of the above referenced Note A, Defendants Jay Rutherford, Jr. and Jay Rutherford, Sr. each executed a Commercial Guaranty dated June 15, 2016 (collectively, "Guaranty A") whereby each individually, jointly and severally, absolutely and unconditionally guaranteed the payment of Note A and Mortgage to Plaintiff and all extensions and renewals thereof. A true and correct copy of Guaranty A is attached hereto as **Exhibit G** and is incorporated herein by reference.

34. As further consideration for Note A, Defendants Jay Rutherford, Jr. and Jay Rutherford, Sr. agreed to pay all costs of collection, including reasonable attorney's fees.

35. Plaintiff has declared the entire balance of Note A and Guaranty A due and payable and hereby demands payment of the same, but said Defendants Jay Rutherford, Jr. and Jay Rutherford, Sr. have refused to pay, and therefore are in default under the terms of Guaranty A.

36. There is due and unpaid on Note A and Guaranty A, as of April 27, 2020, the principal sum of Six Hundred Twenty-Two Thousand Nine Hundred Twenty-Nine and 62/100 (\$622,929.62) Dollars, plus interest in the amount of Thirty-Two Thousand Two Hundred Sixty Seven and 56/100 (\$32,267.56) Dollars, plus late charges in the amount of Five Thousand Seven Hundred Eighty-Three and 14/100 (\$5,783.14) Dollars, plus repayment penalties in the amount of Twelve Thousand Four Hundred Fifty-Eight and 59/100 (\$12,458.59). Demand has been made upon the Defendants Jay Rutherford, Jr. and Jay Rutherford, Sr. to pay said amounts but said Defendants have refused to pay the same, or any part thereof, and said refusal is continuing, all to Plaintiff's injury and damage in the sum of Six Hundred Seventy-Three Thousand Four Hundred Thirty-Eight and 91/100 (\$673,438.91) Dollars, plus interest thereon, plus reasonable attorney's fees and the costs and expenses of this action.

37. Plaintiff hereby expressly seeks a judgment against the Defendants Jay Rutherford, Jr. and Jay Rutherford, Sr. pursuant to S.C. Code Ann. § 29-3-650 for the full amount due under Note A and Guaranty A in the amount of Six Hundred Seventy-Three Thousand Four Hundred Thirty-Eight and 91/100 (\$673,438.91) Dollars, plus interest thereon, plus reasonable attorney's fees and the costs and expenses of this action. The judgment entered against Defendants Jay Rutherford, Jr. and Jay Rutherford, Sr. shall be credited by the amount of the high bid entered at any subsequent foreclosure sale of the Real Property as provided in the

statute. Plaintiff reserves the right to any deficiency judgment as to Defendants Jay Rutherford, Jr. and Jay Rutherford, Sr. after crediting the bid.

FOR A THIRD CAUSE OF ACTION
(Collection on Guaranty)

38. Each and every allegation in the above-numbered paragraphs is repeated herein as if stated verbatim.

39. In consideration of the above referenced Note B, Defendants Jay Rutherford, Jr. and Jay Rutherford, Sr. each executed a Commercial Guaranty dated June 15, 2016 (collectively, "Guaranty B") whereby each individually, jointly and severally, absolutely and unconditionally guaranteed the payment of Note B and Mortgage to Plaintiff and all extensions and renewals thereof. A true and correct copy of Guaranty B is attached hereto as **Exhibit H** and is incorporated herein by reference.

40. As further consideration for Note B, Defendants Jay Rutherford, Jr. and Jay Rutherford, Sr. agreed to pay all costs of collection, including reasonable attorney's fees.

41. Plaintiff has declared the entire balance of Note B and Guaranty B due and payable and hereby demands payment of the same, but said Defendants Jay Rutherford, Jr. and Jay Rutherford, Sr. have refused to pay, and therefore are in default under the terms of Guaranty B.

42. There is due and unpaid on Note B and Guaranty B, as of April 27, 2020, the principal sum of Two Hundred Twenty-Four Thousand Eight Hundred Forty-Eight and 74/100 (\$224,848.74) Dollars, plus interest in the amount of Six Thousand Nine Hundred Fifty-Four and 70/100 (\$6,954.70) Dollars, plus late charges in the amount of Three Hundred Fifteen and 80/100 (\$315.80) Dollars, plus prepayment penalties in the amount of Four Thousand Four Hundred Ninety-Six and 97/100 (\$4,496.97) Dollars. Demand has been made upon the

Defendants Jay Rutherford, Jr. and Jay Rutherford, Sr. to pay said amounts but said Defendants have refused to pay the same, or any part thereof, and said refusal is continuing, all to Plaintiff's injury and damage in the sum of Two Hundred Thirty-Six Thousand Six Hundred Sixteen and 21/100 (\$236,616.21) Dollars, plus interest thereon, plus reasonable attorney's fees and the costs and expenses of this action.

43. Plaintiff hereby expressly seeks a judgment against the Defendants Jay Rutherford, Jr. and Jay Rutherford, Sr. pursuant to S.C. Code Ann. § 29-3-650 for the full amount due under Note B and Guaranty B in the amount of Two Hundred Thirty-Six Thousand Six Hundred Sixteen and 21/100 (\$236,616.21) Dollars, plus interest thereon, plus reasonable attorney's fees and the costs and expenses of this action. The judgment entered against Defendants Jay Rutherford, Jr. and Jay Rutherford, Sr. shall be credited by the amount of the high bid entered at any subsequent foreclosure sale of the Real Property as provided in the statute. Plaintiff reserves the right to any deficiency judgment as to Defendants Jay Rutherford, Jr. and Jay Rutherford, Sr. after crediting the bid.

FOR A FOURTH CAUSE OF ACTION
(Reformation of Mortgage Legal Description)

44. Each and every allegation in the above-numbered paragraphs is repeated herein as if stated verbatim.

45. The property description in the Mortgage contains numerous scrivener's errors in the description of the recorded plat.

46. Plaintiff seeks an order of this Court to reform the property description to include the property plat description and correct the scrivener's error as follows:

All that certain piece, parcel or lot of land, with the buildings and improvements thereon, situate, lying and being in the County of Charleston, State aforesaid, and known and designated as Unit 1094 on a plat of Coastal Surveying Co. Inc., dated

February 12, 1977, having latest revisions dated August 11, **1977**, entitled “**Plat of Phase III of Sparrow Pond Cottages Located on Kiawah Island, Charleston County, South Carolina, owned by Kiawah Island Company, Ltd. Kiawah Island, S.C. 29455**” recorded in Plat Book AJ at Page 83 in the R.M.C. Office for Charleston County, S.C., and having such location, buttings, boundings, dimensions, course and distances as will by reference to said plat more fully appear.

Subject to any and all Restrictions, Covenants, Conditions, Easements, Rights of Way and all other matters affecting subject property of record in the Office of the RMC for Charleston County, South Carolina.

FOR A THIRD CAUSE OF ACTION
(Receiver)

47. Each of the allegations in the above numbered paragraphs are repeated and incorporated herein as if stated verbatim.

48. By virtue of the defaults referenced herein, Plaintiff seeks the appointment of a receiver to protect and preserve the Real Property and to do all acts necessary or required in connection with the administration, management, and/or liquidation of the Real Property, including but not limited to the processing and administering of proceeds as to the Real Property.

WHEREFORE, the Plaintiff prays as follows:

1. A Receiver be appointed for the Real Property.
2. That the amount due Plaintiff on the above-referred to Note A and Note B, as secured by the Mortgage, be ascertained and determined under the direction of this Court, together with attorney’s fees and the costs of this action.
3. That Plaintiff recover judgment against the Defendant Rutherford Group, Jay Rutherford, Jr. and Jay Rutherford, Sr. in the amount found to be due, together with attorney’s fees and the costs of this action.
4. That the scriveners’ errors in the plat description in the legal description be corrected.

5. That the court ascertain which lien or liens on the Real Property, if any, are prior to that of Plaintiff.

6. That Plaintiff's Mortgage be declared to be a valid lien against the above referred to Real Property with the appropriate priority, and that the Plaintiff have judgment of foreclosure against Jay Rutherford, Jr. and Kitric Rutherford subject to the liens of any mortgages found to be prior to the Mortgage held by Plaintiff, for the amount found to be due, together with attorney's fees and costs of this action.

7. That Plaintiff's Mortgage upon the above referred to Real Property be foreclosed, subject to the lien of any mortgages found to be superior to that of Plaintiff, the equity of redemption barred, and the Real Property sold under the direction of this Court.

8. That the proceeds of the sale be applied as follows:

- a. to the costs, disbursements, and expenses of this action, including a reasonable attorney's fee for the Plaintiff's attorney;
- b. to the amount due Plaintiff; and
- c. the surplus, if any, be held subject to the further order of this Court.

9. That the Plaintiff be granted judgment against the Defendant Rutherford Group, Jay Rutherford, Jr. and Jay Rutherford, Sr. for the full amount due under Note A and Note B at the hearing on the matter, with subsequent credit to be entered against said judgment after the foreclosure sale of the Real Property pursuant to S.C. Code Ann. § 29-3-350.

10. For such other and further relief as the Court may deem just and proper.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Frank B.B. Knowlton

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**ATTORNEYS FOR CITY NATIONAL BANK OF WEST
VIRGINIA**

Columbia, South Carolina

April 30, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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City National Bank of West
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v.

Jay F. Rutherford, Jr., Kitric
W. Rutherford, The
Rutherford Group, LLC, Jay
F. Rutherford, Sr.,

Appellants.

PROOF OF SERVICE

I certify that I have served the Motion to Reinstate on City National Bank of West Virginia by depositing a copy of it in the United States Mail, postage prepaid, on October 14, 2020, addressed to its attorneys of record listed below.

ATTN: Frank Knowlton and Graham Mitchell
Nelson Mullins Riley & Scarborough LLP
PO Box 11070
Columbia, SC 29211-1070

October 14, 2020

/s/Shawn M. French, Sr.

Shawn M. French, SC BAR No.: 75007

Attorney for Appellants

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Rutherford Motion to Reinstate0020