THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Joseph M. Strickland, Master in Equity

Case Nos. 2011-CP-40-6317 and 2011-CP-40-6318
Appellate Case No. 2018-000251

South State Bank.....Respondent,

v.

Sand Dollar 31, LLC; and Rhonda Meisner ..... Defendants,

Of whom Rhonda Meisner is the .....Appellant.

FINAL BRIEF OF THE RESPONDENT

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STATEMENT OF THE CASE

This appeal concerns the Richland County Master in Equity's ("Master") determination of the amount of the deficiency judgments entered against Appellant Rhonda Meisner ("Meisner") in these two foreclosure cases, the Master's denial of Meisner's motion to amend her pleadings to add new claims four years after judgment was entered on those pleadings, and the Master's lifting of the automatic appellate stay to permit the filing of the return of the appraisers as required by statute and by his order entered prior to the appeal.

1. Case history prior to Meisner's first appeal in Appellate Case No. 2012-213558.

On July 24, 2006, Sand Dollar 31, LLC, executed and delivered a promissory note to Respondent[1] to secure a loan in the amount of $36,000.00. (R. p. 76 ¶ 7.) At the same time, and in order to further secure this loan, Sand Dollar 31, LLC, also gave a mortgage to Respondent covering its real estate at 8391 Winnsboro Road, Blythewood, South Carolina (hereafter the "8391 Winnsboro Road property"). (R. p. 76 ¶¶ 8-9.)

Also on July 24, 2006, Sand Dollar, 31, LLC, executed and delivered a second promissory note to Respondent to secure a loan in the amount of $31,140.00. (R. p. 51 ¶ 7.) At the same time, and in order to further secure this second loan, Sand Dollar 31, LLC, gave a mortgage to Respondent covering its real estate at 4824 Linden Street, Columbia, South Carolina (hereafter the "4824 Linden Street property"). (R. p. 51 ¶¶ 8-9.)

As additional security, Meisner executed personal guaranty agreements for both loans.

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[1] At the time of the origination of both mortgage loans at issue, Respondent's name was South Carolina Bank and Trust, N.A. After the origination of these two loans, but before the filing of these two foreclosure cases, Respondent changed its name to SCBT, N.A. After the filing of these two cases, Respondent converted from a federally-chartered banking association to a South Carolina state-chartered banking corporation known as SCBT. Respondent subsequently filed Articles of Amendment to its Articles of Incorporation with the South Carolina Secretary of State on May 7, 2014, changing its name to South State Bank effective June 30, 2014. These entities are all referred to as "Respondent" throughout this brief.

(R. p. 51 ¶ 11; R. p. 77 ¶ 11.)

On September 22, 2011, Respondent filed these two foreclosure actions against Sand Dollar 31, LLC, asserting that the promissory notes were in default and requesting that the mortgages be foreclosed against their respective properties. (R. pp. 101-154.) On September 27, 2011, Respondent amended its complaint in both actions to also seek a judgment against Meisner personally on her guaranty of the loans. (R. pp. 50-99.)

On January 19, 2012, Sand Dollar 31, LLC, and Meisner filed an Answer and Counterclaim in which they asserted a counterclaim for a declaratory judgment as to the responsibilities and obligations of the parties under the notes, mortgages, and guaranty agreements. (R. pp. 158-159 ¶¶ 17-25; R. pp. 164-165 ¶¶ 17-25.) A close reading of the counterclaim reveals that its only purpose was to assert and preserve the defendants' post-sale appraisal rights under S.C. Code Ann. § 29-3-680 to 29-3-770 ("Appraisal Rights Statutes"). (*Id.*)

On February 21, 2012, Respondent filed a timely Reply to the counterclaim. (R. pp. 166-170.) The cases were referred to the Master by Orders of Reference entered on January 25, 2012. (R. pp. 47-49.)

On April 25, 2012, the Master held a final foreclosure hearing in both cases. (R. pp. 475-499.) A representative of Respondent appeared and testified. (R. p. 477, line 18-p. 487, line 5.) The Master also heard testimony from Meisner. (R. p. 488, line 17-p. 496, line 18.) The Master granted judgment in favor of Respondent on its claims for foreclosure and enforcement of the guaranties. (R. pp. 500-516; R. p. 496, lines 22-24.)

At the conclusion of the foreclosure hearing, the only issue remaining to be decided was the defendants' right to have the property appraised pursuant to the Appraisal Rights Statutes. (R.

p. 497, lines 17-20)("I'm not sure if ... we talked about the ... we had a declaratory judgment action for the appraisal rights ..."). To resolve that issue, Respondent stipulated that it would not challenge any petition for an appraisal of the properties. (R. p. 498, lines 1-2; R. p. 503 ¶ 21; R. p. 512 ¶ 22.)

On May 16, 2012, the Master entered Judgments of Foreclosure and Sale in favor of Respondent in both cases. (R. pp. 500-516.) As part of the judgments, the Master made a finding of fact that Meisner personally guaranteed the two loans (R. p. 501 ¶ 11; R. p. 510 ¶ 11) and entered judgment against her personally. (R. p. 503 ¶ 24; R. p. 513 ¶ 26). That judgment amount included the attorney's fees and costs awarded to Respondent. (R. pp. 501-502 ¶¶ 16-17; R. pp. 510-511 ¶¶ 16-17.)

The Master attached Form 4 orders to each of the judgments that instructed the county clerk of court to enroll the total judgment debt amounts in both cases against Sand Dollar 31, LLC, and Meisner. (R. pp. 39-42.) The Form 4 orders indicated that the cases were "ended," but noted that:

> As required by statute, a foreclosure sale has been or will be scheduled, which will officially end the case. Also, if a deficiency judgment remains demanded, a separate Order for Deficiency Judgment will be entered at the completion of the foreclosure sale.

(*Id.*)

The Master held the foreclosure sale of the two properties on June 4, 2012. (R. p. 497, lines 2-13.) Respondent was the successful bidder for both properties. (R. pp. 517-520.) Because Respondent demanded deficiency judgments, the properties were scheduled for a second sale to be held on July 5, 2012. (*Id.*)

On June 7, 2012, Sand Dollar, LLC, and Meisner filed a Motion to Alter or Amend pursuant to Rules 52, 59, and 60, SCRCP. (R. pp. 592-600.) In this motion, Meisner argued for

the first time that the terms of the guaranty agreements limited her personal liability for the deficiency to a specific dollar amount. (R. pp. 593 ¶ 3; R. pp. 598-599 ¶ 3.)

At the second foreclosure sale on July 5, 2012, Meisner, through a bidding agent, upset Respondent's bids on both properties by successfully bidding $25,001.00 for the 4824 Linden Street property and $10,501.00 for the 8391 Winnsboro Road property. (R. pp. 517-520.) Meisner then assigned both bids to South Carolina Operating Room Equipment, LLC ("SCORE"), a company in which Meisner is the sole member. (R. pp. 654-659; R. p. 626; R. p. 238, lines 18-23.)

On July 31, 2012, Meisner filed a "Petition for Appraisal S.C. Code Ann. § 29-3-680 *et. seq.*" in both actions in which she sought an order of appraisal under the Appraisal Rights Statutes. (R. pp. 521-528.) In the petition, Meisner complained that "the mortgaged property was sold for a figure significantly beneath its appraised value" even though she was the buyer of both properties and controlled the sale amounts. (*Id.*) Meisner designated Angela Buckley of Certified Appraisal Services as her appraiser. (*Id.*)

On July 18, 2012, the Master held a hearing on the Motion to Alter or Amend. (R. pp. 447-474.). After hearing the arguments of the parties, the Master denied the motion. (R. p. 469, lines 2-3; R. p. 472, lines 11-15.)

On August 8, 2012, the Court entered Orders of Deficiency against both defendants in both cases. (R. pp. 44-45.)

On August 13, 2012, the Master held a status conference with the parties to discuss the appraisal rights process. (R. pp. 433-446.) At the conference, the Master agreed that Respondent's deadline to designate its own appraiser would not begin to run until 10 days after service of a copy of an order for an appraisal (R. p. 434, line 23-p. 435, line 9), but suggested

that Respondent could go ahead and hire an appraiser to start working with Meisner's appraiser (R. p. 435, line 9-12).

By letter to the Master dated August 17, 2012, Respondent designated Eugene C. Garvin, Jr. (hereafter "Eugene Garvin"), of Garvin Appraisals, as its appraiser. (R. p. 663.) Eugene Garvin is a state-certified residential real estate appraiser.

On September 6, 2012, in response to Meisner's various attempts to reduce or eliminate the deficiency liability that she created and controlled through her foreclosure sale bid amounts, Respondent filed a Motion to Vacate Foreclosure Sale. (R. pp. 581-589.) However, this motion was never ruled upon by the Master before Respondent abandoned it and voluntarily withdrew the motion. (R. pp. 631-632; R. pp. 803-804.)

On November 6, 2012, the Master held a status conference at which no court reporter was present and no record of the conference was made. (R. p. 35.) That same day, the Master entered an Order Denying Defendants' Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP in both cases. (R. pp. 36-37.)

2. Meisner's appeal in Appellate Case No. 2012-213558.

On December 6, 2012, Meisner, proceeding *pro se*, filed an appeal to this Court from the Order Denying Defendants' Motion to Alter or Amend. *SCBT, N.A. v. Sand Dollar 31, LLC, and Rhonda Meisner*, Appellate Case No. 2012-213558 (S.C. Ct. App. filed Dec. 6, 2012). On appeal, Meisner argued that: (1) the master erred in awarding attorney's fees; (2) Respondent was estopped from valuing the properties less than the amount stated in Respondent's Motion to Vacate Foreclosure Sale (hereafter the "judicial estoppel argument"); (3) the Master erred in allowing the judgments of foreclosure to be entered before the judicial sale; and (4) the Master erred in denying her motion to alter or amend. *Id.*

On December 3, 2014, in an unpublished opinion, the Court held that the Master abused his discretion in determining that the Bank's attorney's fees were reasonable without first reviewing affidavits of attorney's fees, but that the Master did not err in allowing the judgments to be entered against Meisner prior to the judicial sale. *SCBT, N.A. v. Sand Dollar 31, LLC, and Rhonda Meisner*, Op. No. 2014-UP-435 (S.C. Ct. App. filed Dec. 3, 2014). As to the second (judicial estoppel) and fourth (denial of the motion to alter or amend) issues on appeal, the Court found these issues were unpreserved for appellate review. *Id.* The Court remanded the cases "so the master can award reasonable attorney's fees." *Id.* at 2.

On December 18, 2014, Meisner filed a Petition for Rehearing. *Id.* On January 23, 2015, the Court of Appeals denied Meisner's Petition for Rehearing. *Id.*

On February 23, 2015, Meisner filed a Petition for a Writ of Certiorari in the South Carolina Supreme Court. *South State Bank, f.k.a. SCBT, N.A. v. Sand Dollar 31, LLC, and Rhonda Meisner*, Appellate Case No. 2012-000352 (S.C. filed Feb. 23, 2015). On July 23, 2015, the South Carolina Supreme Court denied Meisner's petition for a writ of certiorari. *SCBT, N.A. v. Sand Dollar 31, LLC, and Rhonda Meisner*, S.C. Sup. Ct. Order dated July 23, 2015.

On October 21, 2015, Meisner filed a Petition for a Writ of Certiorari in the United States Supreme Court. *Rhonda Meisner v. South State Bank, f.k.a. SCBT, N.A.*, No. 15-681 (Oct. 21, 2015). On January 25, 2016, the United States Supreme Court denied Meisner's Petition for a Writ of Certiorari. *Id.*

On November 19, 2015, this Court sent a remittitur of these two cases to the lower court.

3. Case history subsequent to Meisner's appeal in Appellate Case No. 2012-213558.

On July 1, 2016, Meisner filed a "Motion for Application of Appraisal Statute; Determination of Deficiency Against Defendants; and Final Adjudication of Counterclaims," in

which she requested only that the Master "hear the remaining issues pending before the Court in the above entitled cases which were unable to be determined on the record on December 6, 2012 due to the unavailability of the Court reporter." (R. pp. 577-579.)

On July 22, 2016, Meisner filed a "Memorandum in Support of Denial of Attorney's Fees in Total Request for Costs" in which she argued that the guaranty agreements she signed for these loans were unenforceable against her individually and, therefore, she had no personal liability for deficiency. (R. pp. 625-629.)

On July 27, 2016, the Master held a hearing on remand as instructed by this Court for the purpose of awarding reasonable attorney's fees to Respondent. (R. pp. 391-432.) At the hearing, Respondent submitted to the Master two affidavits for each case in support of the awards of attorney's fees in the 2012 foreclosure judgments: 1) an original Affidavit of Attorney's Fees from Teri K. Stomski, Esquire, dated April 24, 2012; and 2) an original Affidavit of Sean M. Foerster, Esquire, dated July 26, 2016, authenticating the timekeeping records of Respondent's law firm. (R. p. 405, lines 11-16; R. p. 407, line 18-p. 408, line 24.) Meisner objected to these affidavits on the grounds that they were not served on her two days in advance of the remand hearing. (R. p. 406, lines 5-9.) The Master took the issue of the amount of attorney's fees to be awarded to Respondent under advisement and allowed Meisner until September 1, 2016, to file any objections she may have to the two affidavits submitted that day. (R. p. 409, line 2-3; R. p. 418, line 4-6.)

On August 19, 2016, Meisner filed "Objections to Attorney's Fees Affidavit Submitted at the July 27, 2016 Hearing." (R. pp. 572-574.) In this filing, Meisner complained that the two affidavits submitted by Respondent at the hearing on July 27, 2016, had not been served two days in advance of the hearing "as required by Rule 6" (*Id.* ¶ 1), that the billing records attached

to the affidavits contained redactions for privileged information (*Id.* ¶¶ 2, 9), that the affidavits or evidence of attorney's fees were not presented at the foreclosure hearing on April 25, 2012 (*Id.* ¶¶ 3-4), and that the guaranty agreements she signed for these loans were unenforceable against her individually and, therefore, she had no personal liability for Respondent's attorney's fees (*Id.* ¶¶ 6-8).

On August 19, 2016, Meisner also filed a "Motion and Memorandum in Support of Amending the Counterclaims in the Two Above Entitled Cases" in which she requested leave to amend her pleadings to assert new counterclaims against Respondent for abuse of process and malicious prosecution. (R. pp. 556-571.) The factual bases for her proposed counterclaims included: (1) the alleged impropriety of the entry of the personal judgments against her before the foreclosure sales—an issue on which this Court affirmed in Meisner's first appeal; (2) the alleged bias of the appraiser designated by Respondent for purposes of her petition for appraisal; (3) alleged misconduct in bidding by Respondent at the first foreclosure sale; and (4) Respondent's withdrawal of its motion to vacate the foreclosure sale—a motion which Meisner admittedly opposed (R. p. 429, line 9). (*Id.*)

On February 1, 2017, the Master held a hearing on "all pending motions" in both cases. (R. pp. 234-341.) Specifically, the Master heard the issues raised in Meisner's "Motion and Memorandum in Support of Amending the Counterclaims in the Two Above Entitled Cases" (R. p. 262, lines 5-8), her "Petition for Appraisal S.C. Code Ann. § 29-3-680 *et. seq.*", and her "Motion for Application of Appraisal Statute; Determination of Deficiency Against Defendants; and Final Adjudication of Counterclaims." (R. pp. 31-33.) At the hearing, Meisner raised the same judicial estoppel argument she tried to raise in her first appeal. (R. p. 263, lines 3-7.)

The Master also heard the parties for a second time on the issue of the amount of attorney's fees to be awarded to Respondent. (R. p. 306, lines 11-14; R. p. 309, lines 6-9.) Respondent submitted to the Master copies of the same two affidavits from Teri K. Stomski, Esquire, and Sean M. Foerster, Esquire, previously submitted at the hearing on July 27, 2016. (R. p. 309, lines 12-21.) Once again, the Master took the issue of the amount of attorney's fees to be awarded to Respondent under advisement. (R. p. 319, lines 3-6.)

On July 27, 2017, the Master entered an Order denying Meisner's "Motion and Memorandum in Support of Amending the Counterclaims in the Two Above Entitled Cases," rejecting her judicial estoppel argument, and ordering an appraisal of the properties by the appraisers designated by the parties within 30 days of the entry of the Order. (R. pp. 31-33.) The parties were ordered to "thereafter immediately provide the Court with the opinion of the appraisers." (*Id.*)

On August 8, 2017, Meisner filed a "Motion to Alter or Amend Pursuant to S.C.R.C.P. Rule 59(e) and Motion to Hold Actions Items in Abeyance Until Court Can Evaluation Appraisal Evidence" concerning the Order entered on July 27, 2017. (R. pp. 547-552.)

By letter dated September 1, 2017, as required by the Order of July 27, 2017, Respondent submitted the report of the appraisers to the Master, which report came in the form of a letter from Eugene Garvin dated August 30, 2017, and accompanying appraisal reports for each of the two properties (hereafter, the letter and appraisal reports are collectively referred to as the "Return of Appraisers"). (R. pp. 757-802.) According to these documents, Eugene Garvin had appraised the 4824 Linden Street property on September 13, 2012, and Angela Buckley appraised it on September 14, 2012. (*Id.*) Eugene Garvin appraised the 8391 Winnsboro Road property on September 17, 2012, and Angela Buckley appraised it on September 14, 2012. (*Id.*)

All four appraisals occurred approximately 2 months after the second foreclosure sale on July 5, 2012. (*Id.*) In the Return of Appraisers, Eugene Garvin stated: "I stand by my opinion of value for both properties as of the effective date of my reports shown above." (*Id.*) It also stated that based on his conversation with Angela Buckley, he was "convinced that she would concur that she also stands by her opinion of value of the properties as of the effective dates of her appraisals..." (*Id.*)

With respect to the value of the 4824 Linden Street property, Mr. Garvin valued it at $25,000 "as is" and Ms. Buckley valued it at $18,920 "as is" or $31,000 "subject to repairs." (*Id.*) With respect to the value of the 8391 Winnsboro Road property, Mr. Garvin valued it at $16,000 "as is" and Ms. Buckley valued it at $15,470 "as is" or $20,000 "subject to repairs." (*Id.*)

Meisner took no action to comply with the Master's order to provide the Court with the opinion of her designated appraiser and offered no documentation to contradict or supplement the Return of Appraisers.

On October 5, 2017, the Master held a hearing on Meisner's "Motion to Alter or Amend Pursuant to S.C.R.C.P. Rule 59(e) and Motion to Hold Actions Items in Abeyance Until Court Can Evaluate the Appraisal Evidence," on the attorney's fees issue that had been previously taken under advisement at the two prior hearings, and on the Return of Appraisers for purposes of setting the deficiency judgment amounts in both cases. (R. pp. 342-390.) At the hearing, Respondent again submitted to the Master a copy of the Return of Appraisers. (R. p. 366, line 21-p. 367, line 4.)

On December 28, 2017, the Master entered an Order Denying Motion to Alter or Amend and Entering Deficiency Judgments. (R. pp. 7-30; R. pp. 905-914.) In this Order, the Master

denied Meisner's "Motion to Alter or Amend Pursuant to S.C.R.C.P. Rule 59(e) and Motion to Hold Actions Items in Abeyance Until Court Can Evaluate the Appraisal Evidence," affirmed the previous attorney's fees awarded to Respondent in the 2012 Judgments of Foreclosure and Sale, adopted the Return of Appraisers and ordered that it be filed with the county clerk of court, and entered deficiency judgments against Meisner in the following amounts: $38,733.92 plus interest in civil action # 2011-CP-40-6317 and $27,220.45 plus interest in civil action # 2011-CP-40-6318. (*Id.*)

On February 20, 2018, Meisner served and filed a Notice of Appeal from the Order entered on July 27, 2017, and from the Order Denying Motion to Alter or Amend and Entering Deficiency Judgments entered on December 28, 2017.

On April 20, 2018, after noticing that the Return of Appraisers submitted to the Master had not been filed with the clerk of court as the Master had ordered, Respondent filed a Motion to Lift Automatic Stay with the lower court for purposes of accomplishing this filing. (R. pp. 542-543; R. pp. 805-848; R. pp. 545-546; R. pp. 849-892.) On April 30, 2018, the Master entered an Order Lifting Automatic Stay to permit the filing of the Return of Appraisers. (R. pp. 3-6.) On May 1, 2018, Respondent filed the Return of Appraisers with the county clerk of court. (R. pp. 665-756.)

On May 14, 2018, Meisner filed a "Motion to Alter or Amend Pursuant to S.C.R.C.P. Rule 59(e)" with respect to the Order Lifting Automatic Stay. (R. pp. 530-536; R. pp. 894-900.)

On May 29, 2018, the Master held a hearing on Meisner's "Motion to Alter or Amend Pursuant to S.C.R.C.P. Rule 59(e)." (R. pp. 176-233.) On July 19, 2018, the Master entered an Order denying the motion. (R. p. 1; R. p. 902.)

On July 26, 2018, Meisner filed a Notice of Appeal from the Order Lifting Automatic Stay entered on April 30, 2018, and the Order entered on July 19, 2018. By Order filed on September 6, 2018, this Court construed this Notice of Appeal as a motion to amend her original Notice of Appeal to add these two orders, and the Court granted it.

STANDARD OF REVIEW

The Court may affirm for any ground appearing in the record. Rule 220(c), SCACR; *see also Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 614, 682 S.E.2d 498, 502 n. 2 (Ct. App. 2009)(citing *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000)). *See infra* the specific standards applicable to the issues on appeal that are reviewable by the Court.

ARGUMENT

The Court must affirm the Master's Orders entered on July 27, 2017, December 28, 2017, April 30, 2018, and July 19, 2018, for the following reasons:

I. Meisner's personal liability for the deficiency judgments is the law of the case and not reviewable by the Court.

The Court must disregard the approximately 13 pages of Meisner's appellate brief (pp. 12-25) dedicated to disputing the existence of her personal liability for the deficiency judgments under the guaranty agreements. That issue has been fully adjudicated and is the law of the case.

"It is well settled in this jurisdiction that a decision of this court on a former appeal is the law of the case." *Huggins v. Winn-Dixie Greenville, Inc.*, 252 S.C. 353, 357, 166 S.E.2d 297, 299 (1969). "Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571, 776 S.E.2d 397, 403 (Ct. App. 2015). "The law of the case applies both to those issues explicitly

decided and to those issues [that] were necessarily decided in the former [appeal]." *Id.* at 572, 776 S.E.2d at 403 (internal quotations and citations omitted).

"The policy behind the law of the case is to promote the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Id.* at 573, 776 S.E.2d at 404 (internal quotations and citations omitted).

"After the remittitur is sent down from an appellate court, the trial court acquires jurisdiction to enforce the judgment and take any action consistent with the appellate court ruling." *Ackerman v. McMillan*, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996)(internal citations omitted).

The Judgments of Foreclosure and Sale entered in both of these cases on May 16, 2012, concluded that Meisner signed personal guaranty agreements for each loan and was therefore personally liable for the debts in each case, including attorney's fees. (R. p. 501 ¶ 11; R. p. 510 ¶ 11.) Accordingly, the Master entered personal judgments against her in both cases. (R. p. 503 ¶ 24; R. p. 513 ¶ 26; R. pp. 39-42.)

With the exception of the issue of the amount of attorney's fees awarded, this Court affirmed the entry of the 2012 Judgments of Foreclosure and Sale and the Form 4 orders against her personally. Thereafter, her petitions to have the judgments reviewed by the higher courts were denied. Meisner has exhausted all of her appellate remedies with respect to those judgments.

Whether or not, as Meisner contends, the Master verbally agreed to hear Meisner on this issue sometime after the foreclosure sale does not make this issue reviewable by the Court because the Master did not put that agreement into a written order. *Ford v. State Ethics Comm'n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001)("Until written and entered, the trial judge retains

discretion to change his mind and amend his oral ruling accordingly. The written order is the trial judge's final order and as such constitutes the final judgment of the court."); *Doe v. Doe*, 324 S.C. 492, 501, 478 S.E.2d 854, 859 (Ct. App. 1996)("Judgments in general ... are not final until written and entered.").

Therefore, Meisner's personal liability under the guaranty agreements for the deficiency judgments is the law of the case, and the Court is precluded from reviewing that issue.

II. The Master did not err in holding that Respondent was not judicially estopped by any position taken in the motion to vacate the foreclosure sale after it was withdrawn.

The Master did not err in concluding that Respondent was not bound by any position taken in its Motion to Vacate Foreclosure Sale since the motion was voluntarily withdrawn before being ruled upon.

A. Standard of Review.

"A mortgage foreclosure is an action in equity." *United States Bank Tr. Nat'l Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009)(internal citations and quotations omitted.) "In an appeal from an action in equity, tried by a judge alone, we may find facts in accordance with our own view of the preponderance of the evidence." *Id.* "However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." *Id.* "Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *Id.*

B. Law and Discussion.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or

related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). South Carolina "formally adopted the doctrine of judicial estoppel as it relates to matters of fact, not law." *Id.* "The doctrine of judicial estoppel is an equitable concept and should be applied sparingly, with clear regard for the facts of the particular case." *Id.* at 216, 592 S.E.2d at 632.

"The following elements [are] necessary for the doctrine to apply: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent." *Id.* at 215-16, 592 S.E.2d at 632.

The evidence in this matter fails to satisfy any of these elements. The glaring flaw in Meisner's judicial estoppel argument is that Respondent cannot be not bound by any position taken in a withdrawn motion. This Court has noted that "parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." *Gary v. Lowcountry Med. Transp., Inc.*, 424 S.C. 18, 22, 817 S.E.2d 291, 293-94 (Ct. App. 2018)(emphasis added). Respondent sees no reason why this same rule would not extend to motions practice.

Respondent withdrew its Motion to Vacate Foreclosure before the motion was ruled upon, and therefore Respondent is not judicially bound by any statements in the motion. Since the withdrawal of the Motion to Vacate Foreclosure Sale, Respondent has taken no position on the values of the properties. Instead, per Respondent's stipulation that it would not oppose

Meisner's petition for an appraisal, it has deferred to the professional opinions of the designated appraisers and the impartial judgment of the Master as to those values.

Respondent was never successful on any position it took in the Motion to Vacate Foreclosure Sale because the Master never ruled on this motion before Respondent withdrew it. While Meisner argues that the motion was heard by the Master at a status conference and that Respondent should be bound by statements allegedly made at that conference, she concedes that the conference was not memorialized or recorded by a court reporter. (Appellant's Br. pp. 27, 30.) Bench conferences or off-the-record discussions that are not made part of the record are not preserved for review. *See York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997); *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 213, 723 S.E.2d 597, 608 (Ct. App. 2012); *see also City of N. Charleston v. Gilliam*, 311 S.C. 252, 254, 428 S.E.2d 720, 721 (Ct. App. 1992)("We take this opportunity to admonish the bar that evidentiary rulings made at sidebar conferences, pretrial hearings, and other in limine hearings without the presence of a court stenographer, must be reiterated from the record when the case is called for trial.").

Finally, there is no evidence in the record of any intentional effort by Respondent to mislead the Master.

For these reasons, the Court must affirm the Master's rejection of Meisner's judicial estoppel argument.

III. The Master did not err in his determination of the amount of the deficiency judgments against Meisner.

The Master did not err in his determination of the amount the deficiency judgments against Meisner for any of the reasons raised in her appeal.

A. Standard of Review.

"In an appeal from an action in equity, tried by a judge alone, we may find facts in

accordance with our own view of the preponderance of the evidence." *Bell*, 385 S.C. at 373, 684 S.E.2d at 204. "However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." *Id.* "Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *Id.*

B. Law and Discussion.

Meisner disputes the Master's determination of the deficiency judgment amounts on the following grounds: (1) judicial estoppel—that the Master should have found that Respondent was bound to its position as to the properties' values in its withdrawn Motion to Vacate Foreclosure Sale; (2) that she is not personally liable for deficiency judgments because she did not sign the guaranty agreements in her "individual or personal capacity"; (3) that the deficiency judgments should not include attorney's fees awarded to Respondent because Respondent failed to serve the affidavits in support of attorney's fees two days in advance of the remand hearing on July 27, 2016; (4) that Respondent's designation of its appraiser was untimely; and (5) that the appraisal of Eugene Garvin was outdated and not reflective of the fair market value of the two properties.

As to Meisner's arguments based on judicial estoppel and the non-existence of her personal liability for the deficiency, *see supra* Argument sections I and II of this brief. As to her remaining arguments:

1. Timeliness of service of affidavits in support of award of reasonable attorney's fees.

The requirement in Rule 6, SCRCP, that affidavits be served not later than two days prior to a motion hearing was inapplicable to the remand hearing. "When a motion is to be supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in

Rule 59(c), additional or opposing affidavits may be served not later than two days before the hearing, unless the court permits them to be served at some other time." Rule 6(d), SCRCP (emphasis added). The remand hearing did not involve any motion by Respondent. The remand hearing was required by this Court in its opinion filed on December 3, 2014, in Appellate Case No. 2012-213558. To the extent that the Court holds this rule was applicable to the remand hearing, then Respondent contends the affidavits were timely under the court permission exception. The Master accepted the affidavits and entered judgments based on them, thus implicitly permitting the timing of their service.

Therefore, the Master did not err in including reasonable attorney's fees in the deficiency judgments against Meisner.

2. Timeliness of Respondent's designation of an appraiser.

"[W]ithin ten days after service of a copy of the order upon the judgment creditor or his attorney of record he shall designate to the clerk another appraiser..." S.C. Code Ann. § 29-3-710 (emphasis added).

The first order in this case granting Meisner's petition for an appraisal and ordering an appraisal of the property was entered on July 27, 2017. Plaintiff designated its appraiser by letter to the Master dated August 17, 2012—five years prior to this order. (Letter.) Further, it is clear on the face of the Order of July 27, 2017, that Plaintiff had already designated its appraiser before the entry of that order. (R. pp. 31-33.) Therefore, Plaintiff's designation of its appraiser was timely as it was made well before ten days after service of a copy of the Order of July 27, 2017.

Therefore, Respondent timely designated its appraiser, and the Master did not err in relying on the opinion of that appraiser in determining the amount of the deficiency judgments against Meisner.

3. Age and accuracy of appraisals of Eugene Garvin.

According to the Return of Appraisers, Eugene Garvin appraised the 4824 Linden Street property on September 13, 2012, and Angela Buckley appraised it on September 14, 2012. Eugene Garvin appraised the 8391 Winnsboro Road property on September 17, 2012, and Angela Buckley appraised it on September 14, 2012. All four appraisals occurred a little over 2 months after the second foreclosure sale on July 5, 2012. In his letter of August 30, 2017, Eugene Garvin stated: "I stand by my opinion of value for both properties as of the effective date of my reports shown above." Based on his conversation with Angela Buckley, he was "convinced that she would concur that she also stands by her opinion of value of the properties as of the effective dates of her appraisals..." Neither Meisner nor Angela Buckley ever offered any evidence that Eugene Garvin had misrepresented Ms. Buckley's opinion or ever offered any different professional opinion as to the value of these two properties.

Given that the only professional opinion that the Master received in response to the Order of July 27, 2017, was the Return of Appraisers, and given that neither Meisner nor Angela Buckley ever presented the Master with any other professional opinion, the Master did not err in relying on the Return of Appraisers in determining the amount of the deficiency judgments against Meisner.

For all of these reasons, the Court must affirm the Master's determination of the deficiency judgment amounts.

IV. The Master did not abuse his discretion in denying Meisner's motion to amend her pleadings to add new counterclaims four years after entry of the Judgments of Foreclosure and Sale.

The Master did not abuse his discretion in denying Meisner's motion to amend her pleadings to assert new counterclaims because the motion was made after a final judgment on the claims in those pleadings.

A. Standard of Review.

"Courts have wide latitude in amending pleadings and, while this power should not be exercised indiscriminately or to surprise or prejudice an opposing party, the matter of allowing amendments is left to the sound discretion of the trial judge." *Hale v. Finn*, 388 S.C. 79, 87-88, 694 S.E.2d 51, 56 (Ct. App. 2010).

B. Law and Discussion.

"When a party wishes to amend a pleading after final judgment from a full trial on the merits, South Carolina Rule of Civil Procedure 15(b) applies." *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). However, "[a]mendments under South Carolina Rule of Civil Procedure 15(b) are allowed not to assert new claims, but rather to conform the pleadings to the evidence presented at trial." *Id.*

The purpose of Meisner's proposed amendment was to add new counterclaims against Respondent, not to cause her pleadings to conform to the evidence presented at the final foreclosure hearing on April 25, 2012. Therefore, her proposed amendment was not permitted by the rules.

Further, reopening the pleadings four years after judgment, and after an appeal from those judgments, would have been prejudicial to Respondent.

By focusing her argument in her appellate brief on the merits of her proposed counterclaim for abuse of process against Respondent, Meisner puts the cart before the horse. On a motion to amend, the court is concerned only with "procedural arguments, not arguments concerning the substance and merits of the counterclaims and/or defenses proposed." *Collins v. Sigmon*, 299 S.C. 464, 466, 385 S.E.2d 835, 836 (1989). "It follows that the trial judge should generally not consider these substantive arguments at the mere amendment stage." *Id.*

Meisner cites to no case law showing where a party was permitted to amend the pleadings to add new claims over four years after the entry of a final judgment on those pleadings and after the conclusion of an appeal from that judgment.

For these reasons, the Court must affirm the Master's denial of Meisner's motion to amend her pleadings.

V. The Master did not abuse his discretion in lifting the automatic stay to permit the filing of the Return of Appraisers with the Richland County Clerk of Court.

The Master did not abuse his discretion in lifting the automatic stay to permit the filing of the Return of Appraisers as required by statute and ordered by the Master prior to the appeal.

A. Standard of Review.

"An abuse of discretion occurs when the judge's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the judge is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case." *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 5, 630 S.E.2d 464, 467 (2006).

B. Law and Discussion.

"As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision." Rule 241(a), SCACR. "This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court." *Id.* "Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal." Rule 241(d)(1), SCACR. "Any party aggrieved by the decision of the lower court, the administrative tribunal, or an individual judge or justice may petition under this Rule for a review of that decision." Rule 241(d)(7), SCACR.

Meisner's opposition to the Master's lifting of the automatic stay is based on her misguided belief that without the filing of the Return of Appraisers with the clerk of court, there was no evidence to support the Order of December 28, 2017. That is not the case.

The Master requested the Return of Appraisers pursuant Meisner's petition for an appraisal. The Return of Appraisers was submitted to the Master by letter of September 1, 2017, and again at the hearing on October 5, 2017 (R. p. 366, line 21-p. 367, line 4). It is clear from the Order of December 28, 2017, that it was presented to the Master, he reviewed it, and he relied on it in setting the deficiency judgment amount in civil action # 2011-CP-40-6318, but (to Meisner's benefit) not in civil action # 2011-CP-40-6317. (R. pp. 7-30; R. pp. 905-914.)

The filing of the Return of Appraisers was merely the completion of a clerical or ministerial task required by the Appraisal Rights Statutes and ordered by the Master prior to the

appeal pursuant to his inherent power to control the records of these cases. S.C. Code Ann. § 29-3-740 ("The return of the appraisers shall be filed and recorded by the clerk as a judgment of the court and be subject to appeal as hereinafter provided."); *see Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. at 10, 630 S.E.2d at 469 (noting that a court has "inherent power to control its own records and supervise the functioning of the judicial system"). This filing in no way furthered the matters already adjudicated or the relief provided for by the Order of December 28, 2017.

For these reasons, the Court must affirm the Master's lifting of the automatic stay to permit the filing of the Return of Appraisers.

CONCLUSION

Based on the foregoing and any additional sustaining grounds appearing in the record, Respondent South State Bank respectfully requests that the Court affirm the Master's Orders entered on July 27, 2017, December 28, 2017, April 30, 2018, and July 19, 2018.

Respectfully submitted,

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July 12, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Joseph M. Strickland, Master in Equity

Case Nos. 2011-CP-40-6317 and 2011-CP-40-6318
Appellate Case No. 2018-000251

South State Bank.....Respondent,

v.

Sand Dollar 31, LLC; and Rhonda Meisner ..... Defendants,

Of whom Rhonda Meisner is the .....Appellant.

CERTIFICATE OF COUNSEL

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

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