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SC Court of Appeals

ELECTRONICALLY FILED - 2021 Mar 01 9:31 AM - MARION - COMMON PLEAS - CASE#2019CP3300853

STATE OF SOUTH CAROLINA

COUNTY OF MARION

Avatar Partners CT, LLC,

PLAINTIFF,

vs.

HSGCHG Investments, LLC f/k/a Carolina Entertainment Complex, LLC; Partners 95, LLC; Oil Barons, Inc.; and Robert D. Hartmann, Sr.,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

C/A NO: 2019-CP-33-00853

ORDER AND JUDGMENT OF FORECLOSURE AND SALE

(DEFICIENCY DEMANDED AGAINST HSGCHG INVESTMENTS, LLC F/K/A CAROLINA ENTERTAINMENT COMPLEX, LLC, PARTNERS 95, LLC, OIL BARONS, INC., AND ROBERT D. HARTMANN, SR.)

TO: Magalie A. Creech
FINKEL LAW FIRM LLC
Attorneys for the Plaintiff

ANSWERING DEFENDANTS:
Louis H. Lang, Esquire
Attorneys for Defendants

Avatar Partners CT, LLC ("Plaintiff" or "Avatar")'s action for the foreclosure of a commercial mortgage on the property, commonly known as 1549 S HWY 501, Marion, SC 29571, owned by HSGCHG Investments, LLC f/k/a Carolina Entertainment Complex, LLC having been tried before this Court in a non-jury proceeding, based upon a preponderance of the evidence and the arguments presented, this Court sets the following Findings of Fact and Conclusions of law, pursuant to Rule 52(a), SCRCF, and finds that entry of judgment of foreclosure and sale against Defendants is proper.

Pursuant to Rule 53 SCRCF, the above-entitled matter was referred. Any appeal from any order or judgment issued by the master or special referee shall be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.

Pursuant to the said Order of Reference, a non-jury trial was held and was attended by counsel. The testimony was taken, which is reported herewith. From the testimony and evidence, I find, conclude and order as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Lis Pendens was filed on December 17, 2019.
2. The Summons and Complaint were filed on December 17, 2019.

Handwritten initials "K/20" in the left margin.

3. Service was made upon the Defendants named in this Report as is shown by the proof of service filed herein.

4. All of the defendants herein and/or all attorneys of record were notified of the time, date and place of the hearing in this matter.

5. According to the Answer filed on July 13, 2020, the Defendant Robert D. Hartmann, Sr. is not in the Military Service of the United States of America, as contemplated under the Servicemembers Civil Relief Act (2003), and any amendments thereto.

6. In Defendants' Answer, they admit the execution of the loan instruments that are the subject of Plaintiff's action but cite insufficient information regarding the amounts due thereunder. Defendants also allege that the subject property's value greatly exceeds the debt owed to Plaintiff, and assert two equitable defenses. First, Defendants assert that Plaintiff should be required to marshal its assets and accept the property in full satisfaction of the debt. Second, Defendants alternatively assert that if the property is to be sold at public auction, that it be sold before the companion mortgaged properties located in Connecticut. Finally, Defendants assert that if the property is to be sold at public auction, that it be divided into several tracts whose respective values Defendants allege exceed the debt amount.

7. The following facts are not in dispute and Plaintiff's Exhibits 1 through 8, identified hereinbelow, were entered without objection:

- a. Plaintiff's Exhibits 1 through 8:
 - i. Commercial Promissory Note
 - ii. Recourse Guaranty
 - iii. Commercial Mortgage
 - iv. Assignment of Rents and Leases
 - v. UCC Financing Statements
 - vi. Assignments of Mortgage
 - vii. First Modification of Mortgage
 - viii. Second Note Modification Agreement
- b. On or about January 22, 2015, for value received, Partners 95, LLC, Oil Barons, Inc., and HSGCHG Investments, LLC executed and delivered to Avatar Capital Finance, LLC a certain promissory note (hereinafter "Note") in the sum of \$2,000,000.00, together with interest thereon pursuant to the terms of the Note.
- c. To secure the payment of said Note and debt, secured thereby, and in accordance with the terms and conditions thereof, on January 22, 2015, HSGCHG Investments, LLC executed and delivered to Avatar Capital Finance, LLC, its

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successors and assigns, a mortgage (hereinafter "Mortgage") covering the following described property ("Mortgage"):

All that certain piece, parcel or tract of land lying and being situate South of the City of Marion, Marion Township, Marion County, South Carolina, containing 248.52 acres, more or less, as shown on plat prepared for New World Entertainment, Inc. by Beasley Land Surveying, Inc., dated February 14, 2001 and revised March 26, 2002. The said map as revised is recorded in the Office of the Clerk of Court for Marion County on June 13, 2002 in Plat Book 303 at Page 3 and is incorporated herein by reference. The said tract being bounded as follows, now or formerly, to wit: on the North by lands now or formerly of William H. Lide; on the Northeast and East by lands now or formerly of Paul J. Graves and William L. Cheezem, and others; on the South by lands now or formerly of Cheezem and others; on the Southwest by US Highway 501 and lands of Atkinson and other; and on the Northeast by lands of William E. Thompson

LESS AND EXCEPT: All that certain piece, parcel or lot of land containing .066 acres as shown on survey prepared for the City of Marion recorded in the Office of the Clerk of Court for Marion County in Plat Book 304, Page 6 and a fifty (50) foot temporary easement for construction, the said lot and easement being more fully and completely described in a certain deed of Donald D. Godwin and Jack H. Jones to the City of Marion recorded in the Office of the Clerk of Court for Marion County on April 20, 2002 in Deed Book A-472 at Page 296.

TMS#: 085-00-00-001-000

Property Address: 1548 S HWY 501 Bypass (Carolina Amphitheatre) Marion, South Carolina 29571

- d. Thereafter the Mortgage was recorded in the Office of the Clerk of Court for Marion County in Book 295 at Page 7 on January 23, 2015.
- e. The Mortgage constitutes a first lien on the subject property.
- f. Thereafter, the Mortgage was assigned as follows:
 - i. By assignment dated January 23, 2015 and recorded in Book 318 at Page 61 on September 16, 2015, Avatar Capital Finance, LLC assigned as to Parker Ferguson an undivided 5.00% interest, as to Steven Ganeless an undivided 3.750% interest, as to Downtime Enterprises, LLC an undivided 10.00% interest, as to Patrick Guthrie, trustee of the Guthrie Family Trust an undivided 5.00% interest, as to Marc S. Homme APLC Defined Benefit Pension Trust an undivided 2.50% interest, as to O. Michael Homme, Trustee of the Homme Family Trust an undivided 1.250% interest, as to JBH Trust dated June 24, 2009 an undivided 1.250% interest, as to William R. Horton an undivided 7.50% interest, as to MMJ Group, Inc. an undivided 17.50% interest, as to Self Directed IRA Services, Inc. FBO Mark Picking, IRA an undivided 3.750%, as to

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Paul R. Verkuil and Judith Rodin an undivided 3.750% interest, as to Jay and Elaine Hazelrigg an undivided 1.75% interest, as to Richard Kester, trustee of the Kester Family Living Trust an undivided 5.00% interest, as to Susan Lundell an undivided 2.40% interest, as to Patrick A. Waldron and Peggy Waldron an undivided 1.65% interest, as to James and Joyce Zevenbergen Living Trust dated August 18, 2014 an undivided 10.00% interest, the Ronald and Sandra Lope Living Trust dated April 12, 2013 an undivided 10.00% interest, and as to Jerry Zevenbergen an undivided 7.95% interest;

- ii. By assignment dated February 19, 2016 and recorded in 334 at Page 195 on March 11, 2016, Parker Ferguson assigned an undivided 5.00% interest, Steven Ganeless assigned an undivided 3.750% interest, Downtime Enterprises, LLC assigned an undivided 10.00% interest, Patrick Guthrie, trustee of the Guthrie Family Trust assigned an undivided 5.00% interest, Marc S. Homme APLC Defined Benefit Pension Trust assigned an undivided 2.50% interest, O. Michael Homme, Trustee of the Homme Family Trust assigned an undivided 1.250% interest, JBH Trust dated June 24, 2009 assigned an undivided 1.250% interest, William R. Horton assigned an undivided 7.50% interest, MMJ Group, Inc. assigned an undivided 17.50% interest, Self Directed IRA Services, Inc. FBO Mark Picking, IRA assigned an undivided 3.750%, Paul R. Verkuil and Judith Rodin assigned an undivided 3.750% interest, Jay and Elaine Hazelrigg assigned an undivided 1.75% interest, Richard Kester, trustee of the Kester Family Living Trust assigned an undivided 5.00% interest, Susan Lundell assigned an undivided 2.40% interest, Patrick A. Waldron and Peggy Waldron assigned an undivided 1.65% interest, James and Joyce Zevenbergen Living Trust dated August 18, 2014 assigned an undivided 10.00% interest, the Ronald and Sandra Lope Living Trust dated April 12, 2013 assigned an undivided 10.00% interest, and Jerry Zevenbergen assigned an undivided 7.95% interest to Avatar Capital Finance, LLC;
- iii. By assignment dated March 11, 2016 and recorded in Book 347 at Page 81 on July 19, 2016, Avatar Capital Finance, LLC assigned as to Dr. Christopher L. Barley an undivided 1.4286% interest, as to Parker

Ferguson an undivided 4.287% interest, as to RealTrust IRA Alternatives, LLC, a WA Limited Liability Co., Fbo Michael Fotheringill IRA #22199-TR-11 an undivided 0.7143% interest, as to Steven Ganeless an undivided 2.1429% interest, as to Self Directed IRA Services, Inc. Custodian FBO Philip H. Geier Jr. IRA #201525269 an undivided 2.1429% interest, as to Patrick Guthrie Family Partnership an undivided 11.4286% interest, as to Downtime Enterprises, LLC an undivided 5.7143% interest, as to Patrick D. Guthrie, Trustee of The Guthrie Family Trust an undivided 5.7143% interest, as to Jay and Elaine Hazelrigg an undivided 1.00% interest, as to Equity Trust Company, Custodian FBO James Holobaugh, IRA an undivided 1.4286% interest, as to Marc S. Homme APLC Defined Benefit Pension Plan an undivided 2.8571% interest, as to William R. Horton an undivided 8.5714%, as to MMJ Group, Inc. an undivided 10.00% interest, as to Richard Kester, Trustee of The Kester Family Living Trust an undivided 4.2857% interest, as to The Ronald and Sandra Loper Living Trust dated April 12, 2013 an undivided 8.5714% interest, as to Equity Trust Company, Custodian FBO Richard Lundell, IRA an undivided 1.4286% interest, as to Susan M. Lundell an undivided 1.3714% interest, as to PS Funding, Inc., a Delaware Corporation an undivided 11.4286% interest, as to Self Directed IRA Services, Inc. Custodian FBO Mark Picking IRA #201102273 an undivided 2.8751% interest, as to Self Directed IRA Services, Inc. Custodian FBO Theodore B. Smith, III IRA #201525268 an undivided 0.7143% interest, as to Paul and Judy Verkuil an undivided 3.5714% interest, as to Patrick A. Waldron and Peggy C. Waldron an undivided 0.9429% interest, as to Jerry Zevenbergen an undivided 1.6857% interest, and as to James and Joyce Zevenbergen Living Trust dated August 18, 2014 an undivided 5.7142% interest;

- iv. By assignment dated February 27, 2019 and recorded in Book 476 at Page 292 on November 13, 2019, Dr. Christopher L. Barley assigned an undivided 1.4286% interest, Parker Ferguson assigned an undivided 4.2857% interest, RealTrust IRA Alternatives, LLC, a WA Limited Liability Co., Fbo Michael Fotheringill IRA #22199-TR-11 assigned an undivided 0.7143% interest, Steven Ganeless assigned an undivided

2.1429% interest, STRATA Trust Company Custodian Fbo Philip H. Geier Jr IRA #201525269 assigned an undivided 2.1429% interest, Patrick Guthrie Family Partnership assigned an undivided 11.4286% interest, Downtime Enterprises, LLC assigned an undivided 5.7143% interest, The Guthrie Family Trust assigned an undivided 5.7143% interest, Jay and Elaine Hazelrigg assigned an undivided 1.00% interest, Equity Trust Company, Custodian, FBO James Holobaugh, IRA assigned an undivided 1.4286% interest, Equity Trust Company, Custodian, FBO Marc Homme, IRA assigned an undivided 2.8571% interest, William R. Horton assigned an undivided 8.5714%, MMJ Group, Inc assigned an undivided 10.00% interest, Kester Family Living Trust assigned an undivided 4.2857% interest, The Ronald and Sandra Loper Living Trust dated April 12, 2013 assigned an undivided 8.5714% interest, Equity Trust Company, Custodian, FBO Richard Lundell, IRA assigned an undivided 1.4286% interest, Susan M. Lundell assigned an undivided 1.3714% interest, PS Funding Inc, a Delaware Corporation assigned an undivided 11.4286% interest, STRATA Trust Company Custodian FBO Mark Picking IRA #201102273 assigned an undivided 2.8571% interest, STRATA Trust Company Custodian FBO Theodore B. Smith, III, IRA #201525268 assigned an undivided 0.0000% interest, Paul R. Verkuil & Judith Rodin assigned an undivided 3.5714% interest, Patrick A Waldron & Peggy C. Waldron assigned an undivided 0.9429% interest, Jerry Zevenbergen assigned an undivided 1.6857% interest, and James and Joyce Zevenbergen Living Trust dated August 18, 2014 assigned an undivided 5.7143% interest to AVATAR PARTNERS CT, LLC, the present lienholder and Plaintiff herein.

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- g. On or about January 22, 2015, for value received, the Defendant Robert D. Hartmann, Sr. executed and delivered to Avatar Capital Finance, LLC, a Recourse Guaranty (“Guaranty”), guarantying the performance of Defendants Partners 95, LLC, Oil Barons, Inc., and HSGCHG Investments, LLC under the terms of the Note, including payment of all amounts due and owing.
 - h. The parties modified the terms of the Note and Mortgage which, *inter alia*, increased the unpaid principal balance to \$3,500,000.00 and extended the maturity date to June 1, 2019.

- i. The underlying commercial promissory Note secured by the Mortgage that is the subject matter of this action concerns a commercial transaction. Accordingly, the Mortgage is not subject to the Homeowner Affordability and Stability Plan, the Home Affordable Modification Program (HMP), the United States Treasury Supplemental Directive 09-01 and the Administrative Order of the South Carolina Supreme Court dated May 22, 2009 (2009-05-22-01) and thus the foregoing provisions are inapplicable. In addition, the subject property is not an owner occupied dwelling and the Administrative Order issued by the Chief Justice of the Supreme Court of South Carolina on May 2, 2011, Order 2011-05-02-01, is not applicable.
- j. Pursuant to the terms of the Mortgage, any sums paid by Plaintiff for inspecting and securing the subject property, for fire and other hazard insurance, taxes and assessments for the mortgaged premises, and any costs of collection, including reasonable attorney's fees, are secured by the Mortgage.
- k. According to the terms of said Mortgage, and as additional security, the mortgagor assigned all rents, issues and profits of the mortgaged premises from and after any default thereunder, and should legal proceedings be instituted pursuant to said Mortgage, the mortgagee, its successors and assigns, was given the right to have a Receiver appointed of the rents, issues and profits, who, after deducting all charges and expenses attending such proceedings, and the execution of his trust as a Receiver, shall apply the residue of the rents, issues and profits, towards the debt secured by said Mortgage.
- l. No Receiver was appointed to the subject property as it has not generated any rents or profits since the commencement of this action.
- m. The titleholder of record in and to the subject property as of the filing of the Lis Pendens in this action is HSGCHG Investments, LLC f/k/a Carolina Entertainment Complex, LLC.

8. Plaintiff's witness, Mr. Jerry Zevenbergen, testified that he has been a 50% owner and manager of Avatar Capital Finance, LLC and Avatar Partners CT, LLC from their corporate inception through present. He testified that Avatar Capital Finance, LLC originated the subject loan and has been the only servicer of the account. He also testified that Avatar Partners CT, LLC, the current lienholder and Plaintiff, is a special purpose entity that was solely created to own the loan and proceed with this foreclosure action.

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Mr. Zevenbergen testified that he has personal knowledge of the loan transaction; has access to Avatar Capital Finance, LLC's servicing records, which he reviews in the course of his duties as manager; is familiar with the subject account; that Avatar Capital Finance, LLC's records for the subject loan are normally kept by it in the course of its commercial mortgage business; that it is Avatar Capital Finance, LLC's regular practice to make its records at or near the time of the occurrence or events reflected in those records; that it is Avatar Capital Finance, LLC's regular practice for those records to be made by a person with knowledge or from information transmitted by a person with knowledge; and that he personally is involved in and oversees the accounting performed by employees of Avatar Capital Finance, LLC.

Mr. Zevenbergen further testified that had reviewed Avatar Capital Finance, LLC's servicing records for the subject loan account, that the loan matured without payment, and is in default.

9. Plaintiff's Default Letters to Defendants and its Affidavit of Attorney's Fees were entered without objection as Plaintiff's Exhibit 9 and Exhibit 13, respectively.

10. Defendants objected to the admission of Plaintiff's Statement of Account, Income and Expense Sheets, and Payoff as Exhibits 10, 11, and 12, respectively, on the grounds that the proper foundation had not been laid for their admission and that they do not constitute business records pursuant to Rule 803(6), SCRE.

11. "All evidence must be authenticated." *State v. Brown*, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018). "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE. The authentication standard is not high, *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 S.C. 58, 64-65, 773 S.E.2d 607, 610 (Ct. App. 2015), and "a party need not rule out any possibility the evidence is not authentic. In the realm of authentication, the law, like science, is content with probabilities." *State v. Green*, No. 5659 WL 2608756 at *2 (Ct. App. June 26, 2019).

12. With respect to Exhibit 10, Plaintiff's Statement of Account, Mr. Zevenbergen testified that it is a document generated from Avatar Capital Finance, LLC's regular accounting records. Specifically, Avatar Capital Finance, LLC uses software that is common in the mortgage industry called Mortgage Office. He explained that the information contained in Plaintiff's Statement of Account is maintained on a current basis, and was prepared at or near the time of the occurrence or events reflected in it. He further explained that Plaintiff's Statement of Account is kept in Avatar Capital Finance, LLC's regular servicing business course of dealing.

13. With respect to Exhibit 11, Plaintiff's Income and Expense Sheets, Mr. Zevenbergen testified that it is an accounting of rents received and expenses paid relative to the loan, and is segregated by the entities who are the Borrowers. He explained that this document was prepared by Avatar Capital Finance,

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LLC's accountant Carla Stadler, who is an accountant with the company with knowledge of the information that is inputted into the document. He explained that Ms. Stadler obtains knowledge of this information by receiving the rents, as she is the person who accounts and deposits, either by wire or check the monies received into Avatar Capital Finance, LLC's collection bank account. He further explained that all Ms. Stadler's activities are performed in the regular course of Avatar Capital Finance, LLC's servicing business, and that the information contained in the Income and Expense Sheets is entered near or at the time of the occurrence of the events reflected in the document.

14. With respect to Exhibit 12, Plaintiff's Payoff, Mr. Zevenbergen testified that the document was prepared by Cara Stadler in Avatar Capital Finance, LLC's, who reports to him, and that payoffs are a record maintained in the regular course of Avatar Capital Finance, LLC's loan servicing business. He testified that the information contained in the Payoff was prepared from the records that Avatar Capital Finance, LLC maintains as the servicer of the loan, and that he reviewed it with Ms. Stadler.

15. See Rule 803(6), SCRE (providing a record custodian or other qualified witness must testify the evidence to be submitted under the business records exception meets the requirements of Rule 803(6), SCRE); *Dep't of Health & Env'tl. Control*, 350 S.C. at 249–50, 565 S.E.2d at 297 (requiring business records be “identified by a qualified witness who can testify regarding the mode of preparation of the record” in order to be admissible under the business records exception); *see also Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 73, 773 S.E.2d 607, 615 (Ct. App. 2015) (“[A] witness is qualified to testify about a business record, despite the fact he or she did not personally participate in creating the record and was not the custodian ‘at or near the time’ the record was made.”). Rather, to be considered a “qualified witness,” the witness needed only to convey information from a person with knowledge. *See id.* (“[A] person is a ‘qualified witness’ under the rule if the testimony conveys information from a person ‘with knowledge’ at the time the records were created.”).

16. Defendants' objections to the admission of Exhibits 10, 11, and 12 were overruled.

17. At the close of its presentation of evidence, Plaintiff testified that the debt due and owing as of December 14, 2021 was \$5,839,616.99, exclusive of outstanding attorney's fees and costs, and sought leave to supplement the record with evidence of debt amounts incurred at trial and post-trial matters including preparation of the proposed order, sale documents, and required notices.

18. Defendants argued that Plaintiff failed to establish its standing to foreclose, based on their contention that a 3.457167% interest in the Mortgage had not been assigned to Plaintiff.

19. However, Plaintiff's testimony indicates that it was its belief that all interests in the Mortgage had been assigned to Avatar Partner's CT, LLC at the time the foreclosure was commenced. If any fractional interest remained outstanding, it was due to administrative oversight and not the intent of the parties.

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Plaintiff's testimony also indicates that it would not be difficult to obtain any assignments needed to effectuate a 100% assignment of the Mortgage to Plaintiff.

20. "Generally, a party must be a real party in interest to the litigation to have standing." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006). "In South Carolina, it is well established that an assignee stands in the shoes of its assignor." *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 639, 518 S.E.2d 44, 46 (Ct. App. 1999); *see also* S.C. Code Ann. § 36-3-203(b) (Supp. 2012) (providing a transfer of an instrument vests in the transferee any rights the transferor had). "[T]he assignment of a note secured by a mortgage carries with it an assignment of the mortgage, but . . . the assignment of the mortgage alone does not carry with it an assignment of the note." *Bank of America, N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013) (holding a loan servicer is a real party in interest and thus has standing to foreclose); *see also Ballou v. Young*, 42 S.C. 170, 176, 20 S.E. 84, 85 (1894) ("The transfer of a note carries with it a mortgage given to secure payment of such note.").

21. "A mortgage and a note are separate securities for the same debt, and a mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action." *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009); *see also Lever v. Lighting Galleries, Inc.*, 374 S.C. 30, 33, 647 S.E.2d 214, 216 (2007) ("A mortgagee who has a promissory note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action"). This principle has long been settled by the South Carolina Supreme Court, which stated,

The note is the principal and the mortgage is the incident that follows the note in its delivery from one person to another. When a negotiable note payable to order is indorsed generally to the payee the note and its incident pass in the commercial world by delivery.

Union Nat'l Bank of Columbia v. Cook, 110 S.C. 99, 96 S.E. 484, 486 (1918). An assignment of mortgage is not required under South Carolina law. A mortgagor lacks standing to challenge an assignment of mortgage, as it is not a party to the agreement. CITE

22. The Court concludes that at the time of trial there remained an unassigned interest in the Mortgage of 0.7142%. Plaintiff has established that it is the proper party to enforce the Note, the original of which was made available for viewing, and the Mortgage. Furthermore, the missing assignment transferring the remaining 0.7142% interest in the Mortgage was executed and sent for recording subsequent to trial.

23. The Court therefore finds that Plaintiff possesses standing to enforce the Note and foreclose the Mortgage as the owner and holder.

DEFENDANT'S PRESENTATION OF EVIDENCE

24. Defendants offered Joe McMillan as an expert witness to testify regarding the value of the subject property.

25. Plaintiff objected to any testimony from this witness on relevance grounds.

26. Defendants sought to offer the Broker's Opinion of Value, prepared by Mr. McMillan, as Defendants Exhibit 1.

27. Plaintiff objected to the admission of the Broker's Opinion of Value on relevance grounds, and the Court reserved its ruling on same.

28. Mr. Millan opined that the based on his evaluations of the subject property, it is worth \$42,080,000. On cross examination, Mr. McMillan admitted he is not a licensed South Carolina appraiser and that his opinion as to value assumes improvements to the property which have not been made. Upon questioning by the Court as to whether the cost of such improvements would exceed several million dollars, Mr. McMillan conceded these improvement costs would be "sizeable."

29. Robert D. Hartmann, Sr. testified on behalf of all the corporate defendants and himself individually. Mr. Hartmann testified that it is his belief the developed value of the subject property is well over \$50,000,000.00.

30. Defendants' Exhibits 2, 3, 4, 5, 6, and 7 identified hereinbelow, were entered without objection:

a. Defendants' Exhibits 2 through 7:

- i. Permanent Stormwater System Maintenance and Responsibility Agreement
- ii. U.S. Army Corps of Engineers Approved Interim Jurisdictional Determination Form, Navigable Waters Protection Rule
- iii. DHEC Notice of Intent for Coverage(s) of Primary Permittees under South Carolina NDPES General Permit for Stormwater Discharges from Construction Activities
- iv. Letter dated August 20, 2020 from Army Corps of Engineers to The Earthworks Group re Approved Jurisdictional Determination (AJD)
- v. DHEC Construction Permit Application for Waste Facilities
- vi. DHEC Construction Permit Application for Wastewater Facilities

31. The Court now sustains the Plaintiff's objection to the testimony of Mr. McMillan and Defendants' Exhibit 1, because the Plaintiff possesses a statutory right of foreclosure of its mortgage and the value of the property is irrelevant to granting this relief. *See Perpetual Bldg. & Loan Ass'n of Anderson v. Braun*, 270 S.C. 338, 242 S.E.2d 407, 408 (S.C. 1978); S.C. Code Ann. §29-3-610 through §29-3-790.

32. Further, the Court finds that Defendants' Exhibits 2 through 7 indicate that efforts have been made to improve the property; however, those efforts cannot equitably overcome the right of Plaintiff to foreclose the mortgage based on the default in payments.

33. As such, and based on the following, the Court concludes that the entry and judgment of foreclosure and sale of the subject property is appropriate.

34. The Court further finds that the debt amounts incurred in paying property taxes, insurance, and legal fees and costs in connection with the companion properties located in Connecticut are not recoverable as a matter of equity under Plaintiff's South Carolina Mortgage. These amounts remain recoverable through enforcement of the Note and the Mortgage(s) securing the Connecticut properties.

35. Finally, the Court finds that while a foreclosure sounds in equity, Defendants' equitable defenses of marshalling assets and a request to divide and sell the property as separate parcels are not supported under South Carolina law.

AS TO THE FIRST AND SECOND CAUSES OF ACTION
(Foreclosure of Mortgage, Suit on Guaranty)

36. Plaintiff in this action is the owner and holder of the Note and Mortgage it is seeking to foreclose.

37. Any notice required by the terms of the Mortgage or by state or federal statutes has been given to the applicable Defendant prior to the commencement of this action.

412 38. Pursuant to Section 37-3-105, South Carolina Code of Laws (1976 as amended), the mortgage lien, which is the subject of this action, is a first lien on real estate and is not a 'consumer loan' for the purposes of the South Carolina Consumer Protection Code. Any notice of right to cure has been given as required.

39. Payment due on the Note has not been made as provided for therein, and Plaintiff, as the holder thereof, has elected to require immediate payment of the entire amount due thereon and has placed the Note and Mortgage in the hands of an attorney for collection.

40. Counsel for Plaintiff filed an affidavit as to attorney's fees and costs in this case, which was not contested, and, therefore, I find as fact herein. Having considered the nature, extent and difficulty of the services rendered, the time involved in reviewing the various documents, performing the title search, preparing the pleadings, attending hearings and argument, the professional standing of counsel, the fee customarily charged for similar services, and the beneficial results obtained for Plaintiff, I find that the sum of \$13,927.50 is a reasonable fee to allow under the terms of the Note and Mortgage as attorney's fees for Plaintiff's attorney for services performed and anticipated to be performed until final adjudication of the action. Plaintiff has advanced \$6,722.50 to its counsel as partial payment of the attorney's fee, and this amount is included in the Payoff. I find that the sum of \$3,080.99 is a reasonable fee to allow under

the terms of the Note and Mortgage as costs. Plaintiff has advanced \$1,294.34 to its counsel as partial payment of its costs of collection, and this amount is included in the Payoff.

41. Pursuant to the terms of the Note, there is regular and default interest accruing at a combined rate of 19.99%.

42. The amount due and owing on the Note, with interest at the rate provided in the Note, and other costs and expenses of collection, including an attorney's fee, secured by the Note and Mortgage, is as follows:

Principal due	\$3,500,000.00
Interest from September 1, 2018 through December 14, 2020 @ 9.99%	810,993.75
Default Interest from November 1, 2018 through December 14, 2020 @ 10.00% ¹	752,498.28
Late Charges as of September 14, 2018	46,620.00
Late Charges from October 15, 2018 through July 1, 2019	26,223.75
Due in Full Fee July 1, 2019	350,000.00
Extension Fee	105,000.00
Taxes on SC Property	53,391.28
Insurance on SC Property	74,659.86
Interest on Taxes & Insurance for SC Property	30,660.11
Legal Fees in SC action (awarded and paid)	6,722.50
Legal Costs in SC action (awarded and paid)	1,294.34
Rents Received from Connecticut Properties	(379,587.18)
Reserve Balance	(40,165.82)
Attorney Fees (awarded but unpaid)	7,205.00
Costs of Collection (awarded but unpaid)	1,786.65
TOTAL DEBT secured by Note and Mortgage, including interest to date shown	\$5,387,468.34

43. Interest for the period from December 14, 2020 as shown above at the rate of 19.99% shall be added to the Principal Balance shown above through the date this Judgment is filed. After the date of judgment, interest at the rate of 19.99% on the total judgment debt should be added to such judgment debt to comprise the amount of Plaintiff's debt secured by the Mortgage.

44. Plaintiff specifically demands a deficiency judgment against the obligor defendants HSGCHG Investments, LLC f/k/a Carolina Entertainment Complex, LLC, Partners 95, LLC, and Oil Barons, Inc., and the guarantor defendant Robert D. Hartmann pursuant to S.C. Code Ann. § 29-3-660 (1976) for any deficiency in this action remaining after sale of the mortgaged premises. *Plaintiff reserves the right to withdraw its demand for deficiency judgment at any time prior to the foreclosure sale.*

¹ Pursuant to paragraph 7(C)(3) of the Note, the Default interest rate is calculated at 10% above regular interest rate of 9.99%. As such, the applicable interest rate is 19.99%.

AS TO THE THIRD CAUSE OF ACTION
(Claim and Delivery on Fixtures and Personal Property)

45. Pursuant to the Mortgage, HSGCHG Investments, LLC granted a security interest in all personal property attached to the land and improvements as constitute a fixture under applicable law.

46. In addition to the mortgage encumbering the property as set forth *supra*, all personal property and fixtures contained within and subject to the above-referenced agreements provide further security for the above-referenced debt pursuant to the UCC-1 Financing Statement recorded in the Office of the Clerk of Court for Marion County on January 23, 2015 in Book 295 at Page 43, and the Amended UCC-3 recorded in the Office of the Clerk of Court for Marion County on March 9, 2015 in Book 299 at Page 5.

47. The property described in the UCC-1 Financing Statements constitute additional collateral securing the debt owed to Plaintiff.

48. The UCC-1 Financing Statements constitute a lien in the collateral described therein.

49. Defendants Partners 95, LLC, Oil Barons, Inc., and HSGCHG Investments, LLC are in default under their subject loan agreements.

50. Plaintiff or the successful purchaser at any sale pursuant to this Order is entitled to the immediate possession of all contents, personal property, and fixtures encumbered and secured by the mortgage and UCC-1 Financing Statements.

AS TO THE FOURTH CAUSE OF ACTION
(Claim and Delivery on Assignment of Leases and Rents, Appointment of Receiver)

51. As additional security, HSGCHG Investments, LLC executed an Assignment of Rents and Leases in favor of Avatar Capital Finance, LLC on January 22, 2015.

52. The Assignment of Rents and Leases was recorded in the Office of the Clerk of Court for Marion County on January 23, 2015 in Book 295 at Page 34.

53. The Assignment of Leases and Rents provides, *inter alia*, that upon or at any time after the occurrence of an event of default, the assignee is entitled to immediate possession of all rents and sums due and payable, and should legal proceedings be instituted pursuant to said mortgage, the mortgagee, its successors and assigns, is entitled to have a Receiver appointed of the rents and profits of the mortgaged premises.

54. While the subject property is has not generated any rents or profits during the pendency of this action, Plaintiff reserves its right to have a Receiver appointed of the rents, issues and profits of the mortgage premises, who, after deducting all charges and expenses attending such proceedings, and the execution of his trust as a Receiver, shall apply the residue of the rents, issues and profits, towards the debt secured by said mortgage.

55. Plaintiff further reserves its right to claim and delivery on rents and profits due under the Assignment of Leases and Rents.

IT IS THEREFORE ORDERED:

1. There is due to Plaintiff under the obligations of the Note and Mortgage set forth in the Complaint the sum of **\$5,387,468.34** representing the "Total Debt" due Plaintiff as set forth in the Findings of Fact, *supra*, together with interest at the rate provided therein from the date aforesaid to the date hereof.

2. The amount due in the preceding paragraph (the "Total Debt" as set forth in the Findings of Fact, *supra*, and later accrued interest) shall constitute the total judgment debt due the Plaintiff and shall bear interest hereafter at the rate of 19.99%.

3. As a deficiency judgment is demanded, the bidding will remain open for a period of thirty (30) days after the date of sale as provided by law in such cases; however, Plaintiff may waive any of its rights, including withdrawing its demand for a deficiency judgment prior to sale.

4. Plaintiff is entitled to such rents and profits in the collateral reflected in the Mortgage and Assignment of Leases and Rents.

5. Plaintiff or any successor of Plaintiff pursuant to any sale under this Order is entitled to possession of all fixtures and furnishings secured by the UCC-1 Financing Statements.

6. The Defendant liable for the aforesaid Mortgage debt shall, on or before the date of sale of the property hereinafter described, pay to Plaintiff, or Plaintiff's attorney, the amount of Plaintiff's debt as aforesaid, together with the costs and disbursements of this action. If such debt is paid in full, then the foreclosure sale shall be cancelled.

7. On default of payment at or before the time herein indicated, the mortgaged premises described in the Complaint, and the property described in the Assignment of Rents, and the property described in the UCC-1 Financing Statement(s) as hereinafter set forth, shall be sold by the Special Referee, or his agent under the direction of the Special Referee, at public auction, on some convenient sales day hereafter (and should the regular day of judicial sales fall on a legal holiday, then and in such event, the sales day shall be on Tuesday next succeeding such holiday), on the following terms, that is to say:

A. **FOR CASH:** The Special Referee will require a deposit of 5% on the amount of the bid (in cash or equivalent), same to be applied on the purchase price only upon compliance with the bid, but in case of non-compliance within 20 days, the deposit may be forfeited without further hearing and applied to the costs and Plaintiff's debt.

B. Interest on the balance of the bid shall be paid to the day of compliance at the rate of 19.99%.

C. The sale shall be subject to taxes and assessments, existing easements and easements and restrictions of record.

D. This Mortgage constitutes a first priority lien on the subject property.

E. Purchaser to pay for deed preparation and costs of recording the Deed, and transfer taxes.

8. If Plaintiff be the successful bidder at the said sale, for a sum not exceeding the amount of costs, disbursements and expenses and the indebtedness of Plaintiff in full, Plaintiff may pay to the Special Referee only the amount of the costs, disbursements and expenses crediting the balance of the bid on Plaintiff's indebtedness.

9. The Special Referee will, by advertisement according to law, give notice of the time, date, place of sale, and the terms thereof, which Notice of Sale is incorporated herein by reference; and will execute to the Purchaser, or Purchasers, a deed to the premises sold. Plaintiff, or any other party to this action, may become a purchaser at such sale, and that if, upon such sale being made, the Purchaser, or Purchasers, should fail to comply with the terms thereof within 20 days after date of sale, then the Special Referee may advertise the said premises for sale on the next, or some other subsequent sales day, at the risk of the highest bidder, and so from time to time thereafter until a full compliance shall be secured.

10. Should Plaintiff, Plaintiff's attorney, or Plaintiff's agent fail to appear on the day of sale, the property shall not be sold, and in that event any such sale shall be null and void and of no force and effect. The property shall be re-advertised and sold at some convenient sales day thereafter when Plaintiff, Plaintiff's attorney, or Plaintiff's agent is present.

11. That the Special Referee will apply the proceeds of the sale as follows:

FIRST: To payment of the amount of the costs and expenses of this action, including any Guardian Ad Litem fee or fees of attorneys appointed under Order of Court.

NEXT: To the payment of Plaintiff, or Plaintiff's attorney, of the amount of Plaintiff's debt and interest, so much thereof as the purchase money will pay on the same.

NEXT: Any surplus funds will be held pending further order of the Court.

12. **IT IS FURTHER ORDERED** that in the event the successful bidder is other than the Defendant(s) in possession herein, upon full compliance with the bid, and upon issuance of a Writ of Assistance by this Court, the Sheriff of Charleston County is ordered and directed to eject and remove from the premises the occupant(s) of the property sold, together with all personal property located thereon, and put the successful bidder or his assigns in full, quiet and peaceable possession of said premises without delay, and to keep said successful bidder or his assigns in such peaceable possession.

13. **IT IS FURTHER ORDERED** that, in the event the successful bidder is other than the Defendant(s) in possession herein and the occupant(s) have voluntarily vacated the premises or have been ejected from the premises leaving furnishings, fixtures and items not subject to Plaintiff's Mortgage in

said premises, upon full compliance with the bid, Purchaser is authorized to remove therefrom all furnishings, fixtures and items not subject to the lien of Plaintiff's mortgage, which personal property, being deemed abandoned, shall be removed by Purchaser or its agents from the subject property by placing said personal property on the public street or highway or by any other means.

14. **IT IS FURTHER ORDERED** that, in addition to all parties deemed by law to have received constructive notice of the action herein, the Defendant(s) named herein and all persons whomsoever claiming under said defendant(s), be forever barred and foreclosed of all right, title, interest and equity of redemption in the said mortgaged premises so sold, or any part thereof.

15. **IT IS FURTHER ORDERED** that the Deed of conveyances made pursuant to said sale shall contain the names of only the first named Plaintiff and the first named Defendant and the Defendant(s) who was/were the titleholder(s) of the mortgaged property at the time of filing of the notice of pendency of the within action, and the name of the grantee, and the Register of Deeds is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said Deed.

16. **IT IS FURTHER ORDERED** that the Special Referee will retain jurisdiction to do all necessary acts incident to this foreclosure including, but not limited to, issuing a Writ of Assistance and hearing any issues involving appraisal proceedings under Section 29-3-680 *et seq.*, South Carolina Code of Laws (1976), as amended.

17. Any sale pursuant to this order is *without* warranty of any kind. Neither Plaintiff nor Court warrant title to any third-party purchaser. All third-party purchasers are made parties to this action and are deemed to have notice of all matters disclosed by the public record, *including* the status of title. *See Ex parte Keller*, 185 S.C. 283, 194 S.E. 15 (1937); *Wells Fargo Bank, NA v. Turner*, 378 S.C. 147, 662 S.E.2d 424 (Ct. App. 2008).

18. The Special Referee shall direct the Register of Deeds to release of record the Mortgage lien being foreclosed, all subordinate liens and all prior liens ordered satisfied herein, after the Order Confirming Sale and Disbursements has been executed and filed.

19. The following is a description of the premises herein ordered to be sold:

All that certain piece, parcel or tract of land lying and being situate South of the City of Marion, Marion Township, Marion County, South Carolina, containing 248.52 acres, more or less, as shown on plat prepared for New World Entertainment, Inc. by Beasley Land Surveying, Inc., dated February 14, 2001 and revised March 26, 2002. The said map as revised is recorded in the Office of the Clerk of Court for Marion County on June 13, 2002 in Plat Book 303 at Page 3 and is incorporated herein by reference. The said tract being bounded as follows, now or formerly, to wit: on the North by lands now or formerly of William H. Lide; on the Northeast and East by lands now or formerly of Paul J. Graves and William L. Cheezem, and others; on the South by lands now or formerly of Cheezem and others; on the Southwest by US Highway 501 and lands of Atkinson and other; and on the Northeast by lands of William E. Thompson

LESS AND EXCEPT: All that certain piece, parcel or lot of land containing .066 acres as shown on survey prepared for the City of Marion recorded in the Office of the Clerk of Court for Marion County in Plat Book 304, Page 6 and a fifty (50) foot temporary easement for construction, the said lot and easement being more fully and completely described in a certain deed of Donald D. Godwin and Jack H. Jones to the City of Marion recorded in the Office of the Clerk of Court for Marion County on April 20, 2002 in Deed Book A-472 at Page 296.

TMS#: 085-00-00-001-000

Property Address: 1548 S HWY 501 Bypass (Carolina Amphitheatre) Marion, South Carolina 29571

The sale of above described real property shall also include all contents, personal property, and fixtures encumbered and secured by the UCC-1 Financing Statements.

This being the same property conveyed to HSGCGH Investments, LLC f/k/a Carolina Entertainment Complex, LLC, a Delaware Limited Liability Corporation by deed of Wells Fargo Bank, N.A. dated December 30, 2014 and recorded in the Office of the Clerk of Court for Marion County on January 23, 2015 in Book 295 at Page 1.

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~~JUDGE'S SIGNATURE PAGE TO FOLLOW~~

February 8, 2021

Janet Porter
Special Referee

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Avatar Partners CT, LLC,

PLAINTIFF

FORM 4
JUDGMENT IN A CIVIL CASE

C/A NO: 2019-CP-33-00853

HSGCHG Investments, LLC f/k/a Carolina
Entertainment Complex, LLC; Partners 95, LLC; Oil
Barons, Inc.; and Robert D. Hartmann, Sr.,

DEFENDANTS.

Submitted by: **FINKEL LAW FIRM LLC**
Magalie A. Creech (SC Bar 78855)

Attorney for: Plaintiff; Defendant;
or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ACTION DISMISSED. (CHECK REASON) Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43 (k), SCRPC (Settled); Other _____.

ACTION STRICKEN. (CHECK REASON) Rule 40(j), SCRPC; Bankruptcy; Binding Arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____

DISPOSITION OF APPEAL TO THE CIRCUIT COURT (Check applicable box): Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow). Statement of Judgment by the Court: _____

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or in any amount should be enrolled. If there is no judgment information, indicate 'N/A' in one of the boxes below.		
Judgment in Favor of (List Name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To Be Enrolled (List amount(s) below)
Avatar Partners CT, LLC	HSGCHG Investments, LLC f/k/a Carolina Entertainment Complex, LLC; Partners 95, LLC; Oil Barons, Inc.; and Robert D. Hartmann, Sr.	
<p>If applicable, describe the property, including tax map information and address referenced in the order:</p> <p>All that certain piece, parcel or tract of land lying and being situate South of the City of Marion, Marion Township, Marion County, South Carolina, containing 248.52 acres, more or less, as shown on plat prepared for New World Entertainment, Inc. by Beasley Land Surveying, Inc., dated February 14, 2001 and revised March 26, 2002. The said map as revised is recorded in the Office of the Clerk of Court for Marion County on June 13, 2002 in Plat Book 303 at Page 3 and is incorporated herein by reference. The said tract being bounded as follows, now or formerly, to wit: on the North by lands now or formerly of William H. Lide; on the Northeast and East by lands now or formerly of Paul J. Graves and William L. Cheezem, and others; on the South by lands now or formerly of Cheezem and others; on the Southwest by US Highway 501 and lands of Atkinson and other; and on the Northeast by lands of William E. Thompson</p> <p>LESS AND EXCEPT: All that certain piece, parcel or lot of land containing .066 acres as shown on survey prepared for the City of Marion recorded in the Office of the Clerk of Court for Marion County in Plat Book 304, Page 6 and a fifty (50) foot temporary easement for construction, the said lot and easement being more fully and completely described in a certain deed of Donald D. Godwin and Jack H. Jones to the City of Marion recorded in the Office of the Clerk of Court for Marion County on April 20, 2002 in Deed Book A-472 at Page 296.</p> <p>TMS#: 085-00-00-001-000 Property Address: 1548 S HWY 501 Bypass (Carolina Amphitheatre) Marion, South Carolina 29571</p>		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**



 Circuit Court Judge

 Judge Code



 Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 2021 and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 2021 to attorneys of record or to parties (when appearing pro se) as follows:

FINKEL LAW FIRM LLC
Post Office Box 41489
Charleston, SC 29423
Attorney(s) for Plaintiffs

SEE ATTACHED LIST

Attorney(s) for the Defendant(s)

SCRCP Form 4C (12/2011)

 CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

