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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2020-001027

JOHN MICHAEL TIMMONS, JR., d/b/a TAVERN ON THE LOOP, Appellant/Respondent,

v.

FIRST RELIANCE BANK, INC.; THE BLANTON COMPANY, INC.;
JBJR ENTERPRISES, INC. d/b/a THE BLANTON COMPANY, INC.;
WW PLASMA II, LLC; DALE PORTER; F.R. SAUNDERS, JR.;
HUNTER WILLIAMS; and JOSEPH B. BLANTON, individually, Defendants,

Of Which FIRST RELIANCE BANK, INC.; DALE PORTER;
F.R. SAUNDERS, JR. are the, Respondents,

And

WW PLASMA II, LLC and HUNTER WILLIAMS are the Defendants.

RECORD ON APPEAL / VOLUME 4 OF 4

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CERTIFICATE OF COUNSEL

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

February 17, 2021

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State of South Carolina) Court of Common Pleas
) Twelfth Judicial Circuit
County of Florence) Case No. 2018-CP-21-00227

John Michael Timmons, Jr.,)
d/b/a Tavern on the Loop,)
)
Plaintiff,)

-vs-

) Transcript of Record
)
)

First Reliance Bank, Inc.;)
The Blanton Company, Inc.;)
JBJR Enterprises, Inc. d/b/a)
The Blanton Company, Inc.;)
WW Plasma II, LLC; Dale)
Porter; F.R. Saunders, Jr.;)
Hunter Williams; and Joseph B.)
Blanton, individually,)
)
Defendants.)

June 10, 2020
Florence, South Carolina

B E F O R E:

The Honorable Michael G. Nettles, Judge

Krystal J. Smith
Circuit Court Reporter

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
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(No Exhibits Presented)

COURT REPORTER LEGEND

dashes --	intentional or purposeful interruption or change in thought
ellipses . . .	trailing off
[ph]	phonetically written
[sic]	written as said

1 JUNE 10, 2020

2 (WHEREUPON, the proceedings began at 10:30 a.m.)

3 THE COURT: All right. I think we have two motions
4 pending before me, if I'm correct. One is filed on behalf of
5 the defendant First Reliance, and is it Ms. Lacey Lee -- is
6 it Houghton?

7 MS. HOUGHTON: Yes, Your Honor. It's Houghton.

8 THE COURT: Houghton. Houghton. Very good. I think I
9 said it the same way last time. Houghton.

10 All right. Ms. Houghton, if you're ready, I'll be glad
11 to hear from you and then we'll hear responses from the other
12 lawyers.

13 MS. HOUGHTON: Yes, Your Honor. Thank you very much.

14 As the Court may recall from the last time we were
15 before the Court not too long ago, I do represent the First
16 Reliance defendants, and that's actually three defendants.

17 That's defendant First Reliance Bank. Also Mr. Dale
18 Porter, who has since retired, but he was an employee of
19 First Reliance Bank at the time of the relevant events and he
20 was really the primary employee involved with the foreclosure
21 that's at issue in this case, and so we'll hear about some of
22 Mr. Porter's deposition testimony.

23 I also represent F.R. Saunders, Jr., Rick Saunders.
24 He's the bank CEO. He had no specific involvement with these
25 underlying events, but he is nonetheless a defendant.

1 We have filed a motion for summary judgment against all
2 of the plaintiff's claims in this action. We filed a
3 memorandum in support of that motion back on June -- May 15.
4 And then because the plaintiff filed a memo subsequent to
5 that, we filed a supplemental memorandum just on Monday
6 responding to some of those specific arguments.

7 So we have sent electronic copies of those memos, Your
8 Honor, to your office and they are fairly comprehensive. All
9 of the law that is cited today, all of the cases, all of the
10 statutes that we discuss are all cited properly in -- in
11 those motions.

12 We do appreciate the opportunity to be before the Court
13 this morning. I know that the Court heard a lot on this
14 matter when the plaintiff presented his motion for summary
15 judgment, but we'd like to sort of go through the facts, just
16 the documents, and sort of layout what happened and how we
17 got here.

18 If the Court may recall, this case arises out of a
19 commercial lease that the plaintiff executed. The plaintiff
20 executed this lease on August 20th, 2015. So that's going
21 back almost -- gosh, almost 5 years ago. So the plaintiff
22 executed this lease with the lessor being listed as The
23 Blanton Company.

24 Now, The Blanton Company entered this lease on behalf of
25 the entity that owned the property, owned the Sweetbriar

1 shopping center that's at issue at that time, which is a
2 company called Atlantic Regional LLC. The Blanton Company
3 had been managing this property for many years on behalf of
4 Atlantic Regional through a property management agreement.
5 And what you'll hear in this case, Mr. Blanton's express
6 testimony is I entered this lease on behalf of Atlantic
7 Regional LLC.

8 Now, the plaintiff did not sue Atlantic Regional LLC in
9 this case. Atlantic is not a party. As far as I guess
10 anyone knows, that's essentially a defunct entity at this
11 point. But at any rate, that is who The Blanton Company
12 entered into this lease on behalf of.

13 Now, the timing of when the plaintiff entered this lease
14 is, of course, sort of a major issue in this case. So the
15 plaintiff entered this lease after my client, First Reliance
16 Bank, had initiated a foreclosure on the Sweetbriar property,
17 a foreclosure action against Atlantic Regional.

18 It had filed a notice of *Lis Pendens* notifying all the
19 world of the pendency of this foreclosure, but the plaintiff
20 nonetheless brings this action against my clients, arguing
21 that he had a valid lease which was not affected by the
22 filing of the *Lis Pendens*, that the lease survived the
23 foreclosure, and that he can, in fact, enforce that agreement
24 against my clients, despite the fact that -- that Atlantic
25 Regional was the lessor.

1 Now, the plaintiff testified that, you know, when he
2 entered this lease -- and I just want to make sure this is
3 clear. At the time the plaintiff entered the lease and prior
4 to the time the plaintiff entered the lease, all of his
5 communications were with The Blanton Company.

6 So the plaintiff does not allege or claim that he had
7 any communications with First Reliance Bank prior to or at
8 the time he entered into this lease. The plaintiff's
9 testimony is that he didn't know there was a foreclosure and
10 that he didn't know that First Reliance Bank had any
11 connection to this property or was sort of in the picture at
12 all.

13 We will see that email correspondence where The Blanton
14 Company expressly obtains approval to enter into this lease
15 on behalf of Atlantic Regional. The Blanton Company sends
16 the lease to Atlantic Regional. Atlantic Regional directs
17 The Blanton Company to negotiate the terms. That's what
18 happened, and then The Blanton Company entered into this
19 lease on behalf of -- on behalf of Atlantic Regional.

20 There is no evidence, you will not see any citations to
21 deposition testimony, you will not hear any competent
22 evidence other than the plaintiff's just allegations and
23 theorizing and speculation that my client authorized or
24 approved this lease. There is no evidence of that whatsoever
25 in this case.

1 Now, the plaintiff asserts a number of claims against my
2 client. There's actually eight separate claims that the
3 plaintiff asserts, and those are the plaintiff asserts a
4 breach of contract action just alleging that this lease is
5 enforceable against the bank. The plaintiff then asserts a
6 number of causes of action that sound in fraud: breach of
7 contract accompanied by a fraudulent act, a fraud claim.
8 There's tortious interference claims and a claim under the
9 Unfair Trade Practices Act and this is, of course, all set
10 out very clearly in our -- in our brief.

11 Now, it's important to note at the outset that while, of
12 course, we're all familiar with the standard, you know,
13 summary judgment standard of the fact that the plaintiff only
14 has to provide a scintilla of evidence to -- to withstand
15 summary judgment, on these fraud claims, there's a heightened
16 standard to withstand summary judgment. The plaintiff has to
17 provide more than a scintilla of evidence on the fraud claims
18 because the plaintiff does have a heightened burden of proof
19 at trial. So at least with respect to those fraud claims, we
20 are dealing with a standard that is more than a scintilla of
21 evidence.

22 We will get into sort of those more specific claims and
23 the fraud theories and those things, but what we focused on
24 in our brief and what the plaintiff is focused on because
25 this issue is dispositive of all of the claims is, was the

1 lease enforceable against First Reliance Bank? What happened
2 with this lease? Did First Reliance Bank approve it? Did
3 First Reliance have knowledge of the details of Mr.
4 Timmons's, you know, proposed investment in the property and
5 things of that nature? We're going to focus on those issues
6 because those are dispositive of all of the claims, and we
7 believe that the undisputed evidence shows that the Bank is
8 entitled to judgment as a matter of law.

9 Just to kind of give the Court an idea of where we are
10 in this case, the plaintiff filed this case about two-and-a-
11 half years ago. We've done a lot of discovery in this case.
12 There's been a lot of depositions in this case. We've
13 mediated this case to no avail. We believe this case is ripe
14 for summary judgment and at this point the Court can make a
15 judgment as a matter of law in favor of the Bank.

16 Getting into the facts of what happened, I think one
17 thing that -- one of the few things that the plaintiff and
18 the defendants agree on in this case is that what happened in
19 this underlying foreclosure action matters because it
20 establishes what the relationships were among the parties
21 when you're talking about First Reliance Bank, Atlantic
22 Regional, and The Blanton Company during the foreclosure and
23 at the time on August 20th when plaintiff came along and
24 executed this lease with The Blanton Company.

25 So I want to discuss what happened in the -- in the

1 foreclosure action. So back in 2006, the bank owned --
2 loaned Atlantic Regional money to purchase the Sweetbriar
3 shopping center and the Bank, of course, as banks do,
4 obtained a mortgage, you know, in exchange for lending
5 Atlantic Regional that money. The Bank also took a separate
6 assignment of rents, which gave it a security interest in any
7 rents that may be derived from the subject property, which is
8 common when a bank loans money on a -- on a property that's
9 going to produce income.

10 Now, I'm going to try to share my screen with you and,
11 hopefully, I do this properly to just look at some of the
12 documents in the foreclosure action. Your Honor, can you --
13 can you see my screen?

14 THE COURT: I can. Very good.

15 MS. HOUGHTON: Okay. Thank you, Your Honor.

16 So Atlantic Regional at some point defaulted on this
17 loan and so on July 20th of 2015, the Bank initiated a
18 foreclosure action. And in the state of South Carolina, when
19 you file a foreclosure action, you also have to file a notice
20 of *Lis Pendens* on the property. So here is the notice of *Lis*
21 *Pendens* that the Bank filed, giving notice to all the world
22 that Atlantic Regional had filed a foreclosure action on this
23 property.

24 The Bank was represented in this foreclosure action by a
25 local attorney, Mr. Coit Yarborough. And three days after

1 the Bank filed this foreclosure action, the Bank also filed a
2 separate motion seeking to be paid the rents on the subject
3 property.

4 So the Bank filed a, quote, motion for order to pay
5 rents to the plaintiff, and this motion was filed against
6 Atlantic Regional LLC and The Blanton Company, Inc., because
7 the Bank, you know, discovered and was aware of the fact that
8 The Blanton Company was actually boots on the ground
9 collecting the rents from the tenants and managing the
10 property for Atlantic Regional. So the Bank also sent this
11 -- this motion to The Blanton Company.

12 Now, the motion for payment of rents very simply says
13 that the Bank -- excuse me, Your Honor. That the Bank will
14 move the Court for an order that the agent for the above-
15 named lessor, that is The Blanton Company, pay lease proceeds
16 due to Atlantic Regional LLC over to the plaintiff pursuant
17 to a South Carolina Code section, which this is a Code
18 section that sort of acknowledges the validity of these
19 assignment of rents and acknowledges that a mortgage -- a
20 mortgagee or an assignor -- excuse me -- an assignee under an
21 assignment of rents can -- can make a demand for these rents.

22 The language of this motion is very clear. The Bank
23 sought nothing more and nothing less than just the right to
24 receive and collect the rents. The Bank did not ask for any
25 more sort of expansive relief with respect to the property.

1 The motion is very simply styled a motion for order to pay
2 rents to the plaintiff.

3 You know, the plaintiff has this theory that by filing
4 this motion the Bank sought to exercise these really
5 expansive rights with respect to the property. That this, in
6 effect, put the Bank in the position of stepping into the
7 shoes of the landlord, of Atlantic.

8 Uh-oh. I've got an error message here that my video
9 condition -- or not. Can anybody hear me?

10 THE COURT: I can hear you and see your document.

11 MS. HOUGHTON: Okay. Okay. Thank you, Your Honor.

12 So here we see, like I said, nothing more, nothing less.
13 The Bank only wants the rights to -- to be paid the rents.

14 Now, on the same day that the Bank filed this motion,
15 the Bank also -- you know, the Bank's attorney, Mr.
16 Yarborough, sent a demand letter to Richard Cooke, who is the
17 principal of Atlantic Regional, and The Blanton Company. And
18 pursuant to this letter, you know, Mr. Yarborough made a
19 demand on The Blanton Company as agent for Atlantic Regional
20 to pay over these lease proceeds. Again, nothing more,
21 nothing less.

22 I'm directing that the two of you immediately pay all
23 rent monies held as principal or agent for Atlantic Regional
24 to Dale Porter at First Reliance Bank. Atlantic Regional is
25 under the -- is in default under the terms of a note,

1 mortgage, and assignment of rents. I'm attaching a copy of
2 my motion that I filed.

3 So again, I mean we assert that these documents make
4 clear exactly what the Bank was trying to accomplish in the
5 foreclosure action, which was with respect to the rental
6 proceeds, simply the right to be paid the rents. Now, the
7 Court granted this order, granted the Bank's motion on
8 October 2nd, 2015. So we see the -- the date stamp there.

9 And in the Court's order on October 2nd, 2015 -- now,
10 again, this is jumping around a little bit. This is after
11 the plaintiff came along and entered into his lease with The
12 Blanton Company. Okay?

13 It wasn't until -- The Blanton Company entered into that
14 lease on 8/20/15. This is October 2nd of 2015. So about, you
15 know, over a month after the plaintiff entered into his
16 lease, the Court actually granted the Bank's order to be paid
17 the rents.

18 Very simply, the Court granted nothing more and nothing
19 less than the Bank's right to receive the rents. The Court's
20 order says the plaintiff holds a recorded assignment of
21 rents. The assignment provides that the plaintiff may
22 collect the rents if the defendant defaults on the loan.

23 The complaint shows that the defendants are -- you know,
24 that the loan is in default. The plaintiff proposes that the
25 current property manager, The Blanton Company, remain

1 property manager, but that all rents collected be paid over
2 to the plaintiff pursuant to the terms of the assignment
3 until the action is concluded.

4 Here, the Bank was not trying to disturb the situation
5 that existed with respect to that property during the
6 pendency of the foreclosure action. It wasn't trying to
7 assert itself as a landlord or get involved in the management
8 of the property. It just wanted the rents. That's what the
9 Court ordered.

10 Now, The Blanton Company, although it had been served
11 with this motion for rents back on July 23rd, The Blanton
12 Company did not start paying any rents to First Reliance Bank
13 until after the Court entered this order. So The Blanton
14 Company's deposition testimony is, you know, we didn't really
15 know what to do. So we didn't pay any rents until the Court
16 entered this order.

17 This is a document that was produced by The Blanton
18 Company in discovery. It was discussed at the depositions,
19 and The Blanton Company essentially prepared this as sort of
20 an accounting of what transpired with the Sweetbriar rental
21 funds.

22 And so you see that from January until July of 2015, all
23 the rental proceeds were disbursed, of course, to Atlantic
24 Regional. The Bank filed its foreclosure in late July. And
25 so from August to September of 2015, The Blanton Company held

1 those rent funds. It didn't disburse them to anybody. And
2 then after the entry of the Court's order in October of 2015,
3 on October 16th, 2015, The Blanton Company issued its first
4 check to First Reliance Bank.

5 You know, the reason that The Blanton Company didn't
6 disburse any funds to First Reliance Bank until after the
7 Court entered the order is because The Blanton Company was
8 not acting under some separate agreement or agency
9 arrangement with the Bank. The Blanton Company was just
10 doing what the Court specifically ordered it to do. The
11 Court ordered it to pay those rents to Atlantic Regional
12 [sic] and so The Blanton Company did that to Atlantic
13 Regional as a creditor specifically pursuant to the terms of
14 a court order.

15 Now, at the conclusion of the foreclosure action, the
16 Court entered a foreclosure judgment and the foreclosure
17 judgment we believe is a -- is a pretty important document in
18 this case because it sets out what the -- you know, it really
19 illustrates what a foreclosure is, what a mortgage is under
20 the state of South Carolina. Under South Carolina law, it
21 illustrates the conditions pursuant to which this property
22 was sold. It sort of really conclusively establishes that an
23 unrecorded lease, that a lease like that held by the
24 plaintiff, was extinguished by this foreclosure judgment and
25 sale.

1 So when we look through the foreclosure judgment, what
2 we see is the Court goes through findings of fact showing
3 that, you know, the defendants were served. It goes through
4 the fact that Atlantic Regional had a promissory note. It
5 goes through the fact that Atlantic Regional had a mortgage
6 on this property. The mortgage was recorded. When we go
7 down a little bit further, it shows that payment on the note
8 has not been made. It's in default.

9 Now, the Court establishes the amount of the judgment
10 that Atlantic Regional is entitled to -- excuse me -- that
11 First Reliance Bank is entitled to against Atlantic Regional.
12 The Court orders that the plaintiff will have -- that First
13 Reliance Bank will have judgment of foreclosure against
14 Atlantic Regional LLC for the total debt stated above and
15 sale of the mortgaged property. The property will be sold at
16 public auction after due advertisement. The sale will be
17 made subject to taxes and assessments, any restrictions or
18 easements of record on the day of such sale.

19 Now, the foreclosure judgment goes through then sort of
20 a litany of requirements and instructions to the special
21 referee. So the Court basically says, special referee --
22 well, let me back up. The Court first says here's the amount
23 of the judgment. I'm sorry. Let me find the right -- the
24 right place.

25 So the Court establishes the amount of the judgment

1 first. The Court then says the defendants have until the
2 date of the sale to pay the amount of the judgment or this
3 property is going to be sold by the special referee, and then
4 gives these, you know, specific instructions that the special
5 referee is to open it up to public auction and sell it to the
6 highest bidder for cash. It'll be sold subject to taxes and
7 assessments, easements and restrictions of record.

8 Now, the foreclosure judgment also says that any
9 proceeds of the sale will be applied first to the cost of the
10 foreclosure, the payment to the -- the payment of the
11 plaintiff's debt that's established by this foreclosure
12 action, and go from there. Importantly, the Court orders
13 that it is ordered that the defendant, which is Atlantic
14 Regional, and all persons claiming under him be forever
15 barred and foreclosed of all right, title, and interest in
16 the -- in the property that's being sold.

17 Now, the reason that I've kind of gone through this
18 foreclosure judgment and read some of these provisions to the
19 Court is, you know, the plaintiff's argument seems to be
20 that, you know, well, once a foreclosure is filed, it's a
21 done deal that the Bank is going to get the property. You
22 know, the Bank is really, truly the real party in interest
23 because everybody knows that the Bank is going to end up with
24 it.

25 It's true that a bank often is the highest bidder for

1 sale on a foreclosure action, but that doesn't change the
2 fact of what a mortgage is, what a foreclosure is under South
3 Carolina law. It doesn't change the fact that all of these
4 formalities have to be observed before there's any passing of
5 title, before the owner of the property, in this case
6 Atlantic Regional, is divested of its interest in the
7 property.

8 So under South Carolina law, when a bank loans money
9 under a mortgage -- we cite all of this -- all of this law in
10 our brief, but when a bank loans money under a mortgage --
11 I'm sorry -- under -- under -- let me back up.

12 When a bank obtains a mortgage from a borrower, South
13 Carolina law says that a mortgage is not a present conveyance
14 of title to a bank or a lender. The bank owns the money that
15 it lent to the borrower, but the borrower retains legal and
16 equitable title to the property.

17 So that's black letter South Carolina law, *Epstein v.*
18 *Coastal Timber Company*. The mortgagor, which means the
19 borrower, of land is the owner in fee and has title to the
20 land so mortgaged, but the mortgagee, which is typically a
21 bank, has a lien upon the land to secure his debt.

22 The South Carolina foreclosure statutes require -- this
23 is S.C. Code 29-3-630. Require that a court of competent
24 jurisdiction must establish the debt for which the security
25 is given before any sale of the foreclosed property may be

1 valid to pass title.

2 So before a bank can obtain an ownership property in
3 some property that it has mortgaged, there has to be a
4 foreclosure action filed, there has to be a foreclosure
5 judgment establishing the amount of the debt, the sale -- the
6 property has to be put up for sale by the public -- by the
7 special referee at a public auction and then, if the bank is
8 the high bidder at the sale, the special referee executes a
9 deed to the bank and that is what divests the -- the
10 borrower, in this case Atlantic Regional, of its interest in
11 the property.

12 Now, the foreclosure judgment really, you know, sets
13 that out and illustrates that where it makes clear -- you
14 know, it establishes the amount of the debt. It says, hey,
15 defendants, this is what you owe. You have until the date of
16 the sale to -- to pay it. If not, the property is going to
17 be sold. It's opened up for sale by the special referee.
18 Anyone can buy it.

19 The Bank was, in fact, the high bidder in this case. So
20 it did end up becoming the owner of the property after a
21 foreclosure auction that took place on February 4th of 2016.
22 So at that point, the Bank became the owner of the property.
23 Atlantic Regional was divested of its ownership interest in
24 the property.

25 Now, four days after the Bank became the owner of the

1 property, on February 8th, 2016, the Bank sent a letter to The
2 Blanton Company. And pursuant to this letter -- and this
3 letter was written by Dale Porter. The Bank notified Mr.
4 Blanton that Atlantic Regional was no longer the owner of the
5 property, that the Bank had purchased the property at the
6 foreclosure sale, and the Bank communicated its position on
7 any existing leases very clearly, you know, was extremely
8 transparent about what it intended to do with the property.

9 The Bank said as a result of that sale, all agreements
10 with Atlantic Regional and the tenants or the occupants are
11 extinguished. And then the Bank says we would like to enter
12 into month-to-month lease agreements with these tenants and
13 we'd like to employ your firm to assist the Bank.

14 You know, at this point, the Bank was asking The Blanton
15 Company to help it and to serve as property manager because
16 it was now the owner. That's the first time the Bank asked
17 The Blanton Company to do anything of that nature or gave any
18 indication to The Blanton Company that it wished for The
19 Blanton Company to act on its behalf.

20 The Bank was transparent about the fact that it was
21 looking for a purchaser and that it was going to sell to a
22 purchaser, regardless of what that purchaser may want to do
23 with the property. The purchaser might want to continue the
24 leases, it might not. So at a very early stage, four days
25 after the Bank becomes the owner, it is completely

1 transparent about its intent with respect to this property
2 and its position on the leases.

3 Now, again, the plaintiff had come along on August 20th,
4 2015, and signed this lease with The Blanton Company. So
5 just to orient where that is, that's after, of course, the
6 bank filed the foreclosure and *Lis Pendens*. It's before the
7 Court in a foreclosure action entered the order directing The
8 Blanton Company to pay First Reliance the rents. It's before
9 First Reliance actually received any rent proceeds on the
10 property and it's, of course, before Atlantic Regional [sic]
11 became the owner of the property.

12 There are very clear legal reasons under South Carolina
13 law why the plaintiff's lease was extinguished as a matter of
14 law by the foreclosure. We, of course, cite all of these in
15 our brief. We believe these are dispositive as to the
16 plaintiff's claims.

17 And the first one of those is that, of course, the
18 plaintiff executed this lease after the filing of a *Lis*
19 *Pendens*. There's a South Carolina statute defining what a
20 *Lis Pendens* is and makes very clear what the effect is of --
21 of an encumbrance that's executed after the filing of a *Lis*
22 *Pendens*.

23 The *Lis Pendens* statute states -- and that's S.C. Code
24 15-11-20 -- that once you've filed a *Lis Pendens*, the
25 pendency of the action shall be constructive notice to a

1 purchaser or encumbrancer of the property.

2 A lease would, of course, be considered an encumbrance.
3 There's case law on that.

4 Any person whose conveyance or encumbrance is
5 subsequently executed shall be deemed a subsequent purchaser
6 or encumbrance -- or encumbrancer and shall be bound by all
7 proceedings taken after the filing of the notice of *Lis*
8 *Pendens* to the same extent as if he were made a party to the
9 action.

10 So the South Carolina jurisprudence on mortgages in the
11 section relating to foreclosures talks about this *Lis Pendens*
12 requirement, and South Carolina jurisprudence on mortgages
13 says that the *Lis Pendens* constitutes constructive notice to
14 a subsequent purchaser or encumbrancer, who shall be bound by
15 the foreclosure decree to the same extent as if he were made
16 a party.

17 The South Carolina jurisprudence goes on to say the
18 plaintiff in a foreclosure action must file a *Lis Pendens* in
19 all foreclosure suits. That's a statutory requirement. And
20 one purpose of this requirement is to give constructive
21 notice to all the world, anybody that may come along and want
22 to try to create an interest in that property, that there is
23 pending litigation and that they will take subject to
24 whatever that -- the result of that pending litigation is.

25 The other reason that -- that we are required to file a

1 notice of *Lis Pendens* in a foreclosure is because it's to
2 protect the integrity of the suit. So it's not just to
3 provide constructive notice. It's to protect the integrity
4 of the suit because once you file that notice of *Lis Pendens*,
5 anyone is charged with notice of it to the same extent as if
6 they were made a party.

7 So the notice of *Lis Pendens* and the *Lis Pendens* statute
8 really does three important things in this case. One, it
9 establishes that the plaintiff had constructive notice of the
10 foreclosure action.

11 The plaintiff claims he didn't know about the
12 foreclosure action, but under South Carolina law, the
13 plaintiff is charged with constructive notice of that
14 foreclosure. That's black letter law and the plaintiff
15 really can't -- the plaintiff really can't escape that --
16 that legal issue and the effect of that constructive notice.

17 The second thing that the *Lis Pendens* statute does
18 that's important is that it establishes that if you attempt
19 to create an interest in a property, like a leasehold, after
20 a notice of *Lis Pendens* has been filed, you are bound by
21 whatever happens in that foreclosure judgment and your --
22 whatever interest you take is subject in all respects to the
23 -- to the -- to the judgment that's rendered in that case.

24 Now, the third thing that I think is important -- and
25 this really comes more from case law and we cite this in our

1 brief. *Pipkin v. Fletcher* is the South Carolina courts say
2 very clearly one may not rely upon a purchase or encumbrance
3 made after the filing of a notice of *Lis Pendens*.

4 Based on the operation of the *Lis Pendens* statute, the
5 plaintiff cannot enforce a lease against First Reliance Bank.
6 First Reliance Bank did what it was supposed to do. It filed
7 a notice of *Lis Pendens*. That constitutes constructive
8 notice. It means that somebody cannot come along and create
9 an interest in property that's enforceable against you once
10 you've filed that notice of *Lis Pendens*.

11 Now, the second major basis for judgment as a matter of
12 law, irrespective of the filing of the notice of *Lis Pendens*,
13 irrespective of the operation of the *Lis Pendens* statute, is
14 the fact that the foreclosure terminated Mr. Timmons's lease
15 as a matter of law, the foreclosure judgment, the sale at
16 public auction of the property.

17 So First Reliance Bank's mortgage was recorded back in
18 2006. It's first in time. It's a purchase money mortgage.
19 It takes priority over any possible liens out there that one
20 could try to, you know, create on this property.

21 The plaintiff executed his lease on August 20th, 2015.
22 The lease expressly says this lease is and shall be
23 subordinated to all existing and future liens and
24 encumbrances against the property. Even if First Reliance
25 Bank's mortgage wasn't prior in time, even if the general

1 rule was that, of course, that the lease was subject to First
2 Reliance's mortgage, the lease that plaintiff read and signed
3 and agreed to be bound -- bound to says that it is subject to
4 any liens that exist on the property. This would, of course,
5 include First Reliance's mortgage, but it would also include,
6 again, the notice of *Lis Pendens* that had been filed. Both
7 by operation of law and pursuant to the specific terms of the
8 lease, the foreclosure extinguished Mr. Timmons's lease.

9 Now, again, we've been through at length what the
10 foreclosure judgment says. It clearly established the
11 conditions on which the property was sold. The property was
12 sold subject only to taxes, easements, and restrictions of
13 record.

14 The plaintiff did not record his lease, despite the fact
15 that there is a statute in the South Carolina Landlord/Tenant
16 Code which specifically says that if you want to give third
17 parties notice of your lease agreement, you have to record
18 it. That is the way in which -- the mechanism by which you
19 are required to give notice to third parties of your lease
20 agreement. So based on simply the foreclosure itself, this
21 lease was extinguished.

22 Now, those are black letter issues of law. Again, they
23 are briefed, you know, extensively in our -- in our memos.
24 We believe that those -- those arguments entitle First
25 Reliance Bank to judgment as a matter of law and establish

1 conclusively that the plaintiff does not have an enforceable
2 lease that it can enforce against First Reliance Bank that
3 survived the foreclosure judgment and sale.

4 Now, in an effort to avoid these legal issues and these
5 bars to the plaintiff's claim -- claims, what the plaintiff
6 claims is, well, you know, actually, the Bank was, in fact, a
7 party to my lease and because the Bank was, in fact, a party
8 to my lease, these generally, you know, applicable issues of
9 law don't operate in this case to extinguish my lease.

10 Here, this is an issue of law that the Court can rule
11 on, and the plaintiff's argument is really twofold. The
12 plaintiff argues that First Reliance Bank was a party to his
13 lease, first because the plaintiff argues that language in
14 the bank's loan documents with its borrower, Atlantic
15 Regional, as a matter of law means that the Bank was, in
16 fact, plaintiff's landlord. We'll talk about that. That is
17 -- that is an incomprehensible reading of those documents in
18 what a mortgage is under South Carolina law.

19 The second thing that the plaintiff claims is that as a
20 matter of fact The Blanton Company was acting as the Bank's
21 agent and entered into this lease under the direction of
22 First Reliance Bank. We'll get into the facts. We'll talk
23 about what the undisputed facts are showing that, you know,
24 as an initial matter on that factual issue, the Bank
25 disputes, obviously, that it authorized Mr. Timmons's lease,

1 that it gave The Blanton Company any instructions to enter
2 into any leases or to enter into this lease specifically.

3 So, you know, the plaintiff has this motion for summary
4 judgment. Any notion that the plaintiff is entitled to
5 summary judgment on this issue is -- is out the window based
6 on the mere fact that the Bank denies all of that.

7 But from the Bank's perspective, on the Bank's motion,
8 we have drilled down into what the actual testimony is. When
9 you look at what -- not what the Bank says, but just what Mr.
10 Blanton says occurred, what the documents show occurred,
11 there is no evidence to support the plaintiff's contention
12 that First Reliance authorized or entered into this lease.

13 So let's go back to the first argument that the
14 plaintiff has, which is based on the Bank's loan documents,
15 the plaintiff can force the Bank into an unwanted
16 landlord/tenant relationship with him.

17 So again, you know, the plaintiff -- the plaintiff's
18 testimony is I never had any communications with First
19 Reliance Bank before I entered into my lease. I never had
20 any communications with First Reliance Bank during the
21 foreclosure. I didn't know that First Reliance Bank had any
22 connection to this case. I didn't know anything about these,
23 you know, whenever loan documents or agreements existed
24 between First Reliance Bank and Atlantic Regional.

25 The plaintiff is not a party to these documents.

1 Nonetheless, plaintiff asserts, well, I can assert a
2 landlord/tenant relationship with the Bank because of these
3 documents.

4 We believe that the relationships of the parties are
5 clear based on the judgments, the foreclosure judgment, the
6 orders that were entered in the foreclosure action, and we
7 believe that provides a basis for summary judgment, but we
8 can at least look at the plaintiff's argument on these loan
9 documents.

10 So the plaintiff points to the mortgage that was
11 executed by Atlantic Regional to the Bank, and this is all
12 the way back in 2006 and we'll pull it up. And the plaintiff
13 really makes two arguments based on these documents.

14 First, the plaintiff argues that this mortgage was a
15 present conveyance of title to First Reliance Bank.
16 Plaintiff argues that when Atlantic Regional executed this
17 mortgage, in fact First Reliance Bank became the owner of the
18 Sweetbriar property.

19 And the plaintiff argues this based on one sentence
20 contained in the mortgage and that mortgage -- and that
21 sentence is right here where it says grant of mortgage, for
22 valuable consideration grantor mortgages, grants, and conveys
23 to lender all of grantor's right, title, and interest to the
24 property.

25 And the plaintiff says ah-ha. It says that they -- that

1 they conveyed all of their interest in the property to the
2 Bank. We've already talked about what South Carolina says a
3 mortgage -- do you need to see it more clearly, Your Honor?

4 THE COURT: I think I can see it. I sure can.

5 MS. HOUGHTON: Okay. Thank you, Your Honor.

6 We already talked about what South Carolina says on
7 mortgages. So this is the sentence that the plaintiff
8 contends where it says grant of mortgage, for valuable
9 consideration grantor mortgages, grants, and conveys all of
10 its right, title, and interest in and to the Sweetbriar
11 property essentially. And the plaintiff says that is a
12 present conveyance of title, that Atlantic Regional conveyed
13 all of its interest in this property to the Bank.

14 It is a fundamental concept of law that when a Court
15 looks at a deed, it has to construe the deed in accordance
16 with what -- with what the law is. South Carolina law can be
17 no clearer about what a mortgage is. A mortgage is not a
18 present conveyance of property. A mortgage is a security for
19 the debt. The bank owns the money that it lent, not the
20 actual property itself.

21 And, you know, the plaintiff is focusing on these two
22 words that the -- that the grantor grants and conveys all of
23 its interest in the property, but when you look at the
24 sentence as a whole, it says very clearly grant of mortgages.
25 Grantor mortgages, grants, and conveys its interest in the

1 property.

2 The rest of the document, the mortgage, is replete with
3 references to the fact that it is a security document. It
4 states that this mortgage, including the assignment of rents
5 and the security interest in the rents, is given to secure
6 payment of the indebtedness. It refers to, you know, the
7 indebtedness, the fact that it's a security agreement at
8 multiple points throughout this document.

9 When you look at this document as a whole, it is
10 abundantly clear it's a security instrument, construed as a
11 mortgage under South Carolina law. It was not a present
12 conveyance of title.

13 Now, the Bank -- excuse me. The plaintiff also makes a
14 secondary argument about the mortgage, not only that the Bank
15 was the owner of the property, but the Bank because of one
16 sentence in the mortgage essentially became a landlord with
17 respect to any tenants that Atlantic Regional entered into
18 leases with during -- during this -- during its ownership of
19 the property.

20 So the plaintiff points to language which states here
21 towards the middle of the page that the grantor, Atlantic
22 Regional, presently assigns to lender all of grantor's right,
23 title, and interest to -- in and to all present and future
24 leases of the property and all rents from the property.

25 Now, this is an assignment of rights. It is not an

1 assumption of duties. This sentence does not mean that the
2 Bank was landlord to all -- any and all tenants that Atlantic
3 Regional entered into leases with during its ownership of the
4 property.

5 When you read through the mortgage, the mortgage makes
6 clear that the plaintiff will -- excuse me. That Atlantic
7 Regional would continue to collect rents unless or until a
8 default. So this states the grantor agrees that the
9 grantor's possession and use of the property will be governed
10 by the following provisions. Until the occurrence of an
11 event of default, the grantor may continue to collect the
12 rents on the property.

13 When you look down at what the Bank's options were on
14 default, this states very clearly rights and remedies on
15 default. Upon the occurrence of an event of default and at
16 any time thereafter, lender -- the lender's option may
17 exercise any one or more of the following rights and
18 remedies. It may exercise its right to collect the rents.

19 This is an option that the Bank had. In the event of a
20 default, it was entitled to collect the rents. The language
21 that the plaintiff appoints -- that the plaintiff points to
22 is not an assumption by the Bank of any of the duties of
23 Atlantic Regional as landlord. It's merely an assignment of
24 the right to collect rents.

25 Now, the plaintiff also points to the Bank's assignment

1 of rents document. So there are sort of two security
2 agreements that are involved here. Atlantic Regional also
3 executed an assignment of rents to -- to the Bank to further
4 secure the loan, and this was executed in 2014. It wasn't
5 recorded until January 27th of 2015, but this is really the
6 more specific document dealing with what the Bank's rights
7 were to the rents.

8 So this documents states for valuable consideration,
9 grantor -- I'm sorry. I've got a little video screen. So
10 I've got to move it down a little.

11 For valuable consideration, grantor hereby assigns and
12 grants a continuing security interest in and conveys to
13 lender all of grantor's right, title, and interest in and to
14 the rents from the Sweetbriar property. Again, this makes
15 clear what the Bank is taking here is an assignment to the
16 rents. It is not assuming duties under Atlantic Regional's
17 separate leases that it may enter into with its tenants.

18 Now, this assignment makes clear -- I mean it grants the
19 Bank some fairly expansive rights under the terms of the
20 assignment. And the plaintiff spends a lot of time arguing
21 that the Bank had the right to enter into a lease with Mr.
22 Timmons, if they wanted. Maybe the Bank did have that right.

23 I mean under the terms of this document, the Bank did
24 have the right to enter into a lease with Mr. Timmons if they
25 wanted. It doesn't change the fact that there's no evidence

1 that the Bank actually sought to exercise that right or did
2 exercise that right. Having the right to do something is
3 very different than choosing to exercise the right to, in
4 fact, do that thing.

5 So here, the assignment talks about the lender's right
6 to receive and collect the rents and it does say that the
7 lender has the right to receive and collect the rents, even
8 if there hadn't been a default. It says that the Bank could
9 enter the property, take possession of the property, maintain
10 the property. This is all, of course, to protect the Bank's
11 investment in -- in the property and the Bank has the right
12 to lease the property, if it so determines.

13 Now, again, the assignment makes clear that these are
14 options that the Bank has, rights that it can choose or not
15 choose to exercise. And here, we see this section, no
16 requirement to act.

17 I'm sorry, Your Honor. I have to move that down just a
18 little bit.

19 No requirement to act. Lender shall not be required to
20 do any of the foregoing acts or things and the fact that the
21 lender shall have performed one or more of the foregoing acts
22 or things shall not require the lender to do any other
23 specific act or thing.

24 This makes crystal clear what the assignment of rents
25 provides is essentially a menu of options that the Bank can

1 undertake. If its security in the property is threatened, it
2 can collect the rents. It can take possession of the
3 property. It can do these things, but the lender is free to
4 choose to do one of these things, none of these things, all
5 of these things. It simply provides options for the Bank
6 that it can then choose to exercise.

7 Now, I've told the Court when we were here previously
8 that I had really searched South Carolina law to see if there
9 was any South Carolina cases that really dive into and parse
10 through and sort of define what this assignment of rents is
11 and evaluate the specific argument that's been made by the
12 plaintiff, which is that a tenant of a borrower can point to
13 these documents and enforce a lender into a landlord/tenant
14 relationship with it. And I was candid with the Court that I
15 wasn't able to find a South Carolina case specifically
16 evaluating and rejecting this theory that's been made by the
17 plaintiff.

18 I think in the plaintiff's latest filing, the plaintiff
19 suggests that I made some concession or agreed with the
20 plaintiff's theory because of that statement, but that's, of
21 course, not the case. I was merely highlighting for the
22 Court that, you know, I hadn't found a South Carolina case on
23 point.

24 Now, what we -- what we do have is instruction from
25 other jurisdictions. We cite this -- this case law in our

1 brief.

2 The Restatement on Mortgages says that when a bank comes
3 in to exercise its right to collect rents, that doesn't make
4 the bank a landlord. These are common security agreements.
5 This is a common arrangement that banks use when they loan
6 money on an income-producing property and we are not going to
7 deem the bank a landlord when the bank does that. It's
8 simply collecting rents as security on a property.

9 We also have a case from Georgia, which is -- you know,
10 I used to practice in Georgia. So that's sort of one of the
11 first places I looked for to see if there was anything
12 relevant, and there's actually a Georgia case where a tenant
13 made exactly the argument that the plaintiff makes in this
14 case.

15 The plaintiff in that case was a tenant. It had a lease
16 with its landlord. The landlord got foreclosed on and the
17 plaintiff said look at this assignment of rents. It says
18 that my landlord had assigned all of its rights in the rents
19 and the leases to the bank. So, therefore, the bank is
20 actually, in fact, my landlord.

21 And the Georgia Court of Appeals said, no, that is not
22 what those documents mean. The Georgia Court of Appeals says
23 that the assignment of leases and rents was not an absolute
24 assignment because the borrower in that case didn't transfer
25 its whole interest in the property to the bank. It still had

1 the right of redemption. It still had these property rights
2 in the property. So it's not an absolute assignment.

3 And so, therefore, the assignment did not create a
4 landlord/tenant relationship between the bank and the tenant.
5 The bank just had a chosen action to collect rents in the
6 event of default.

7 Similarly here, First Reliance Bank had a chosen action.
8 It had the right to go out and collect these rents, if that's
9 what it wanted to do. It did not create a landlord/tenant
10 relationship with the plaintiff.

11 Again, I think that the most you could say about these
12 loan documents are that these loan documents gave First
13 Reliance Bank the right to enter into a lease with -- with,
14 you know, say Mr. Timmons during the foreclosure action just
15 based on the language of the documents themselves. There is
16 no evidence that that is what, in fact, transpired.

17 You know, if courts were to accept the plaintiff's
18 argument about what these loan documents mean, which we think
19 is really just a very far-fetched theory that's not supported
20 by any law and it's really not supported by a careful reading
21 of these documents as a whole, you know, the courts would
22 really be creating a whole new spectrum of liability for
23 banks and would be saying that banks can be liable on, you
24 know, arrangements that the borrower entered into that banks
25 have no control over those things. So it would really be

1 creating a new basis for liability against banks, which, you
2 know, I can't find any support for in the law.

3 Now, that's the plaintiff's first argument, as a matter
4 of law these loan documents created a landlord/tenant
5 relationship between plaintiff and the Bank. As a matter of
6 law, that argument fails.

7 The plaintiff then makes a factual argument, well, as a
8 matter of fact, you can see that the Bank authorized The
9 Blanton Company to enter into this lease. So the -- the
10 plaintiff is arguing here that The Blanton Company acted as
11 the Bank's agent when he entered into this lease with Mr.
12 Timmons.

13 We go through in our brief and I believe that the Court
14 is aware of this, you know, and we talked about this at the
15 plaintiff's summary judgment hearing that an agency theory
16 has to be based on either an actual agency or an apparent
17 agency.

18 So actual agency focuses on the relationship between the
19 alleged principal and the agent. You know, did the principal
20 authorize the agent to go out and act on its behalf? So
21 we'll talk about that.

22 But apparent agency is something different, and apparent
23 agency is -- the plaintiff has no evidence in support of an
24 apparent agency theory just off the bat. So apparent agency
25 focuses on the situation where, you know, okay, maybe there

1 wasn't actual authority between the principal and the agent,
2 but the principal made some manifestations of conduct.
3 Either by its words or its conduct, it manifested to a third
4 party that some agent had the authority to transact business
5 on its behalf.

6 So in this case, the plaintiff -- the plaintiff would
7 have to show that First Reliance Bank either by words or by
8 its conduct made some manifestation to the plaintiff that The
9 Blanton Company had authority to transact business on behalf
10 of First Reliance Bank.

11 Now, the plaintiff's own deposition testimony forecloses
12 this argument. The plaintiff says I didn't know that First
13 Reliance Bank had any connection to this property. I never
14 had any communications with First Reliance Bank. The
15 plaintiff didn't even know that First Reliance Bank really
16 existed in this scenario and never had any communications
17 with First Reliance Bank. Then First Reliance Bank, of
18 course, cannot have made any manifestations of authority to
19 the plaintiff.

20 There's case law that we cite in our memorandum that
21 stands for the proposition where if the plaintiff testifies
22 -- if a plaintiff testifies as Mr. Timmons testified in this
23 case, I didn't even know that, you know, this -- that this
24 alleged principal was -- existed in this scenario, then there
25 can be no apparent agency as a matter of law. So the

1 apparent agency theory is subject to judgment as a matter of
2 law based on the plaintiff's deposition testimony.

3 So that leaves the plaintiff's actual agency theory.
4 And so, you know, to talk about that, we've got to look at
5 what transpired when the plaintiff executed his lease with
6 Mr. Blanton. The -- the plaintiff -- his testimony is he
7 started talking to Mr. Blanton sometime in July or August of
8 2015. So, you know, sometime right around or right before
9 the foreclosure was -- was initiated.

10 On August 17th, 2015, Mr. Timmons provided a written
11 lease proposal to Mr. Blanton, and Mr. Blanton testified that
12 all of this handwritten material is Mr. Blanton's
13 handwriting. So the typed portions were Mr. Timmons's lease
14 proposal. You can see here it is from Mr. Timmons. It's
15 dated August 17th, 2015.

16 So Mr. Timmons made an offer for the property. He
17 proposed a three-year term with two five-year options, he
18 proposed a specific rental amount, and he proposed that he
19 receive six months free rent and no security deposit and he
20 -- Mr. Timmons says in here that the reason he thinks this
21 offer is reasonable, the reason that he's proposing six
22 months of free rent is because the place was destroyed by the
23 previous tenants and I'm looking at somewhere between 80,000
24 to 90,000 investment to get operable.

25 So what we see in the correspondence between Atlantic

1 Regional and -- and First -- excuse me -- Atlantic Regional
2 and The Blanton Company is that The Blanton Company emails
3 this lease proposal to Atlantic Regional. So here's an email
4 from Kelley Modlin, who works for The Blanton Company. It's
5 dated August 18th, 2015. So that's the day after Mr. Timmons,
6 you know, wrote this lease proposal. It's to Rick Cranford,
7 and Rick Cranford is an individual that Mr. Blanton testified
8 he dealt with on behalf of Atlantic Regional.

9 Joe Blanton asked me to send this to you.

10 They send the written lease proposal to Atlantic
11 Regional. Now, Mr. Cranford responds. So here's the email
12 where the lease proposal was sent. Mr. Cranford responds to
13 The Blanton Company employee on August 18th, two days before
14 the lease is executed, and says, Kelley, there are workers
15 here doing construction of some sort. Does this mean that
16 Joe accepted these terms or are we still negotiating? The
17 only real issue I have with the terms is the six months free
18 rent. It seems like a lot. I propose a much less time
19 period, like two months, since the rent is reasonable and no
20 deposit is required. So ultimately, the lease that was
21 entered into by Mr. Timmons, we can see here on the lease
22 proposal -- this is Mr. Blanton's writing -- that they
23 ultimately agreed to three months of a rent-free period.

24 So what we see in this email correspondence is that Mr.
25 Blanton, The Blanton Company, sent Mr. Timmons's written

1 lease proposal to Atlantic Regional. Atlantic Regional said
2 that's too many -- that's too much on the free rent. We need
3 to -- we need to shorten that. Mr. Blanton did that and then
4 Mr. Blanton ultimately entered this lease.

5 And what we also see from the email correspondence is
6 that on August 25th -- so this is five days after the lease
7 was executed. The Blanton Company -- Jean Parks is another
8 Blanton Company employee -- sent a copy of the executed lease
9 to Rick Cranford, again on behalf of Atlantic Regional.

10 And we don't have the attachment. That wasn't produced
11 showing a copy of the lease, but it says here that the
12 attachment was Mike Timmons's commercial lease. So
13 presumably, that was where The Blanton Company sent this
14 lease to -- to Atlantic Regional.

15 Now, there are no such emails of this nature between The
16 Blanton Company and First Reliance Bank. There's no email
17 where The Blanton Company sends the lease proposal to First
18 Reliance Bank. There's no email where the terms of the lease
19 are discussed. There's no correspondence where anything
20 pertaining to Mr. Timmons's lease is discussed because those
21 discussions didn't occur. The -- Mr. Blanton's testimony is
22 expressly -- direct quote, unequivocally, I entered the lease
23 on behalf of Atlantic Regional.

24 That is Mr. Blanton's testimony. The only people who
25 could testify about whether, you know, The Blanton Company

1 entered into this lease on behalf of the Bank are either the
2 Bank or The Blanton Company. The Blanton Company says I
3 entered into it on behalf of Atlantic Regional, not the Bank,
4 and the Bank says The Blanton Company did not enter this
5 lease on our behalf. There's no issue of fact that Mr.
6 Blanton entered into Mr. Timmons's lease on behalf of
7 Atlantic Regional.

8 THE COURT: Is there anything in discovery that would
9 seem to indicate that Mr. Timmons knew that First Reliance
10 was involved in any of these negotiations?

11 MS. HOUGHTON: Well, first, Your Honor, you know, the
12 Bank wasn't involved in the negotiations, but I think I
13 understand what you mean.

14 THE COURT: Well, is there anything they're going to --
15 that you have come across in the discovery that would seem to
16 indicate that First Reliance had some involvement in these
17 negotiations?

18 MS. HOUGHTON: No, Your Honor. And so what -- what the
19 plaintiff can say or what the plaintiff can point to is that
20 Mr. Blanton does testify -- so there's a -- there's a
21 handwritten note here on the -- on the lease that says -- on
22 the lease proposal that says Ray Coit Yarborough, and Mr.
23 Yarborough was the Bank's attorney during the foreclosure
24 action. And so Mr. Blanton testified that he believes he
25 spoke to Coit Yarborough about Mr. Timmons.

1 Now, it's critical though that when you look at Mr.
2 Blanton's testimony, he basically says, you know, I wrote
3 this note. I think I spoke to Mr. Yarborough, but when I
4 asked him -- when I asked Mr. Blanton do you recall the
5 content of that discussion, he said no. And Mr. Le Clercq,
6 the plaintiff's attorney, asked him point-blank did Mr.
7 Yarborough approve Mr. Timmons's lease, and Mr. Blanton says
8 I don't know.

9 So there's no evidence that Mr. Yarborough was sent a
10 copy of this lease proposal, that he got this lease proposal
11 that shows that the plaintiff is proposing a long-term lease,
12 he's proposing this investment in the property. Nothing that
13 shows that Mr. Yarborough was advised of sort of the specific
14 terms of any of this or that Mr. Yarborough, you know,
15 approved of anything or was even asked for any sort of
16 approval.

17 So that is the only thing that I guess the plaintiff
18 could point to to say, well, there's a scintilla of evidence.
19 And by the way, Mr. Yarborough has provided an affidavit that
20 disputes that he had any, you know, communication. He
21 doesn't recall any communication with Mr. Blanton about, you
22 know, tenants or leases and that he would not have approved
23 or authorized any tenants or leases on behalf of the Bank.
24 He would not have, you know, deemed himself to have that kind
25 of authority. So the Bank disputes that for purposes of

1 dealing with the plaintiff's motion for summary judgment.

2 But, you know, the plaintiff showing a scintilla of
3 evidence that Mr. Blanton contacted Mr. Yarborough does not
4 show that the Bank authorized or approved the lease or that
5 the Bank or Mr. Yarborough was made aware of the specific
6 terms of what was being discussed.

7 THE COURT: Ms. Houghton, you have -- and I'm not
8 cutting you off. If you've got more to say, I want to hear
9 it, but this thought has crossed my mind is that you have
10 stated in great detail how as a matter of law that First
11 Reliance and the -- and Dale Porter and Mr. Saunders are not
12 liable but, of course, the plaintiff is in a bad spot and
13 you've maintained -- you are very familiar with this case.
14 You've been dealing with it for a long time, extensive
15 discovery. Do you maintain that because there was a *Lis*
16 *Pendens* that Mr. Timmons has no remedy against any of the
17 defendants?

18 MS. HOUGHTON: You know, Your Honor, I can really -- you
19 know, I don't know the answer to that question. You know,
20 what I can say is, you know, the plaintiff certainly does not
21 have a remedy against First Reliance Bank because it's the
22 party that filed the *Lis Pendens*. And so as the party that
23 filed the *Lis Pendens*, it's entitled, you know, more so than
24 anybody else in the world to the protections of that statute.

25 Plasma -- the claims that the plaintiff has against

1 Plasma are essentially derivative of the claims -- you know,
2 the liability trail that the plaintiff asserts against Plasma
3 kind of comes from the Bank. So, you know, I don't know the
4 answer to that question as to whether the notice of *Lis*
5 *Pendens* precludes judgment against all of the defendants.

6 What I can say is I do know the answer to that question
7 is that the filing of the notice of *Lis Pendens* precludes
8 judgment against my clients, First Reliance Bank, because
9 they're the one that filed that notice of *Lis Pendens* and
10 they're entitled to the protections that are afforded under
11 the statute.

12 THE COURT: All right. And I didn't mean to cut you
13 off. Any -- anything further?

14 MS. HOUGHTON: Yes, Your Honor. I did just want to
15 highlight for the Court a little bit more of the deposition
16 testimony of Mr. Blanton about what transpired with respect
17 to this lease.

18 You know, Mr. Blanton also states in his deposition
19 testimony -- and I think it's important to highlight this. I
20 can't get to it. One second, Your Honor. I'm having some
21 technical difficulties over here.

22 THE COURT: All right. Take your time.

23 MS. HOUGHTON: This is -- this is Mr. Blanton's
24 deposition testimony and this just further highlights and
25 underscores the fact that Mr. Blanton says I was acting on

1 behalf of Atlantic Regional. So I'm asking Mr. Blanton
2 questions and my questions are in bold and then Mr. Blanton's
3 answers here are in -- are not bolded.

4 And so the deposition testimony is, you know, I believe
5 you testified you spoke with Rick Cranford, who is with
6 Atlantic Regional, about Mr. Timmons's interest in the
7 property. Mr. Blanton says yes.

8 Did Mr. Cranford acting on behalf of Atlantic Regional
9 approve Mr. Timmons's lease for the property? Yes.

10 And you asked Atlantic Regional to approve Mr. Timmons's
11 lease because you had always asked Atlantic Regional to
12 approve new leases for the property? And there's sort of
13 some back and forth.

14 With regard to Mr. Timmons, you asked Atlantic Regional
15 to approve that lease, just as you did in your typical
16 practice? And the deponent says yes.

17 And you had a contract with Atlantic Regional that
18 authorized you to enter into leases on their behalf? And the
19 deponent says correct.

20 We discussed the fact that Mr. Timmons's lease was
21 entered into on August 20th, 2015, and Mr. Blanton agrees at
22 that time on August 20th of 2015, he did not have an agreement
23 with First Reliance Bank that authorized him to enter into
24 leases on its behalf.

25 I asked Mr. Blanton do you have a recollection of

1 speaking with anyone at First Reliance Bank about Mr.
2 Timmons's proposed lease or interest in the property, and Mr.
3 Blanton says no.

4 Do you have a specific memory of speaking with anybody
5 about this at the Bank after Mr. Timmons signed the lease,
6 about Mr. Timmons's tenancy or anything pertaining to Mr.
7 Timmons? And Mr. Blanton says no, not prior to the
8 foreclosure proceeding.

9 And then there's sort of some back and forth. I asked
10 when you say foreclosure proceeding, do you mean the time
11 that the Bank actually became the owner of the property?
12 Blanton says I spoke with them after the process began.

13 So my question is after the process began, the
14 foreclosure process began, do you recall having a
15 conversation with anyone at First Reliance Bank specifically
16 about Mr. Timmons, and the deponent says specifically about
17 Mr. Timmons, no, the shopping center as a whole, yes.

18 Mr. Blanton confirms he entered into this lease on
19 behalf of Atlantic Regional. He does not specifically recall
20 any discussion with Dale Porter.

21 Now, in response to the question that the Court just
22 asked me, Mr. Blanton did testify I believe I spoke with Ray
23 Coit Yarborough because I've got this handwritten note.

24 And again, I think the critical issue there on that
25 issue is that, you know, if that were true, if Mr. Blanton

1 did speak with Mr. Yarborough, again there's no evidence that
2 Mr. Yarborough was apprised of anything specific relating to
3 Mr. Timmons's lease. There's no evidence that this lease
4 proposal was sent to Mr. Yarborough or to Mr. Porter.
5 There's no evidence that First Reliance Bank authorized Mr.
6 Blanton to enter into the lease on behalf of Atlantic
7 Regional, and that's not what Mr. Blanton -- what Mr. Blanton
8 contends, whose testimony really -- really couldn't be more
9 clear.

10 On the question of -- you know, even if the Bank did
11 have some knowledge, you know, through Porter or Mr.
12 Yarborough, its foreclosure attorney, if the Bank had some
13 inkling that there was a gentleman named Mike Timmons that,
14 you know, was interested in entering the lease or that had
15 entered a lease, that did not change the operation of the *Lis*
16 *Pendens* statute. It does not change the fact that the
17 foreclosure would have terminated that lease, just as it
18 terminated all other leases existing on the property.

19 Knowledge that Mr. Timmons existed does not equate to
20 authorization of Mr. Blanton to enter into the lease. Really
21 the only reason -- the only way that -- that the plaintiff
22 can -- can avoid these clear legal bars of the *Lis Pendens*
23 statute, of the fact that the foreclosure terminated the
24 lease is if the plaintiff could show that the Bank, in fact,
25 entered into that lease, the Bank was a party to that lease,

1 and there is no evidence anywhere in the record that the Bank
2 agreed to be bound by this lease or entered into it.

3 Now, I think it's important to note that the focus of
4 that agency theory and, you know, the question is was Blanton
5 acting as the agent of First Reliance Bank on the day he
6 entered into this lease with Timmons on August 20th, 2015.
7 The plaintiff argues that, you know, irrespective of the
8 dealing specifically to Timmons that The Blanton Company was,
9 you know, generally acting as the agent of First Reliance
10 Bank.

11 You know, I'm not going to go through these in detail,
12 Your Honor, but the email correspondence that we attached to
13 our supplemental motion, we just went through some of the
14 email correspondence that specifically pertains to the
15 plaintiff, but we've also attached a number of emails.

16 This email correspondence between The Blanton Company
17 and Atlantic Regional during the pendency of the foreclosure
18 action that shows that The Blanton Company was seeking
19 direction from Atlantic Regional as its principal on matters
20 relating to other tenants, other prospective tenants, matters
21 relating to the building issues and repair, requests that
22 tenants were making to make alterations to the building, to
23 remove awnings and things like that, insurance issues,
24 utility issues that came up during the pendency of the
25 foreclosure.

1 All of those issues, all of those questions were dealt
2 with between Atlantic Regional and The Blanton Company. They
3 were not -- none of -- none of those types of discussions
4 occurred with the Bank because The Blanton Company was not
5 acting on behalf of the Bank. The Blanton Company was not
6 managing the property on behalf of this bank. The Blanton
7 Company was not working for the Bank. It was not the Bank's
8 agent.

9 I think, you know, I probably made these, you know,
10 comments I can reserve for responding to the plaintiff, but
11 again, the focus of the inquiry is whether Mr. Timmons was --
12 whether Mr. Blanton and The Blanton Company was acting on
13 behalf of First Reliance Bank on August 20th, 2015, when he
14 entered into this lease with the plaintiff.

15 The plaintiff has highlighted some things in its filings
16 and talks about some things that happened after August 20th,
17 2015, that the plaintiff believes, you know, show that The
18 Blanton Company and First Reliance Bank had some, you know,
19 broader relationship than just the fact that The Blanton
20 Company was paying the rents. We've responded to each of
21 those specific things in our briefs.

22 And even if all of those things were accepted as true,
23 which we believe we've disputed all of them appropriately in
24 our briefs, it doesn't change the fact that none of those
25 things impact what the situation was on August 20th, 2015.

1 Was Blanton acting as the agent of First Reliance Bank? The
2 answer to that question is, of course, no.

3 So, Your Honor, we do assert that we're entitled to
4 judgment as a matter of law on this issue of whether the
5 lease is enforceable against the Bank. The -- the answer to
6 that question is that it's not, for a number of reasons based
7 on general concepts of law, and it's also not for the
8 specific reason that there's no evidence that the Bank
9 authorized this lease or agreed to be bound by it.

10 There are a number of claims that the plaintiff asserts
11 that have additional things that the plaintiff is required to
12 prove. So this issue, the fact that the lease is not
13 enforceable against the Bank, is dispositive of all of the
14 plaintiff's claims. That's why we've focused on this issue.
15 That's why the plaintiff has focused on this issue. It is
16 the primary issue in this case.

17 However, we go through in our -- in our briefing the
18 additional reasons why plaintiff's specific causes of action
19 fail against the Bank as a matter of law, even if, you know,
20 the plaintiff -- the Court were to find there was some issue
21 of fact on whether this lease is enforceable. So I will go
22 through those just briefly and, primarily, you know, we do
23 rely on our briefs for those issues.

24 But the plaintiff asserts a cause of action for breach
25 of contract accompanied by fraudulent act and also a fraud

1 claim against the Bank. And again, those claims are subject
2 to a heightened standard of proof on summary judgment. At
3 the summary judgment stage, the plaintiff is required to
4 submit more than a scintilla of evidence.

5 On these fraud claims, you know, there is no evidence of
6 any fraudulent intent by the Bank. There's no evidence that
7 the Bank engaged in any intent to deceive or --

8 THE COURT: That there was no representation, which is
9 the first element of fraud?

10 MS. HOUGHTON: Exactly. Yes, Your Honor.

11 It sounds like the Court is well acquainted with -- with
12 the requirements of fraud. Would the Court like to hear from
13 me on these specific causes of action? I mean we're going to
14 be --

15 THE COURT: I think you've covered that in the brief and
16 I -- and I -- unless there's something particular that you
17 need to highlight, I've read your brief and understand it.

18 MS. HOUGHTON: Okay. Thank you very much, Your Honor.

19 I'll save any additional comments just in response to
20 the plaintiff's remarks, and I appreciate the Court's
21 attention. I appreciate the fact that the Court has read our
22 briefs and we'll reserve any further comment.

23 THE COURT: All right. Mr. Payne, you also represent
24 First Reliance and Dale Porter. Do you -- I think it's
25 pretty much been covered. Do you want to -- do you need to

1 say anything in addition to that?

2 MR. PAYNE: Your Honor, just one quick point and that's
3 on the importance of the *Lis Pendens*. Having done a lot of
4 foreclosures myself and real estate work too in my 30 years
5 of practice, that *Lis Pendens* is the one thing everybody
6 looks at when they search the titles they look at because
7 anything that happens after that point in time, they don't
8 worry about it, and the reason it's important is because when
9 you file that *Lis Pendens*, you don't have to keep going and
10 searching the title to see what pops up when you're doing
11 these foreclosure actions. If you did, you would never have
12 confidence that you're going to get clear title at the
13 conclusion of the sale.

14 So that's -- that's one thing that is very, very
15 important. And if you do what the plaintiff is trying to do
16 here in this case, you're really going to be overturning some
17 very long-standing South Carolina law in this -- in this
18 particular case. That, on top of a mortgage, is nothing but
19 a lien. It does not allow you to step in and start leasing
20 somebody's property, even though the mortgage or the
21 assignment had that provision in there.

22 As you're well aware, just because it's in a contract
23 doesn't mean that it's allowed under that particular state.
24 It comes up in contracts with construction with the pay if
25 paid clauses all the time.

1 I was trying to enforce an attorney's fee clause in
2 North Carolina on a form contract. It doesn't work. So just
3 because it's in there doesn't change the long-standing law in
4 South Carolina that a mortgage is nothing but a lien and we
5 don't own the property, we can't lease it, and that's why Mr.
6 Blanton says that. That's why the lease doesn't mention
7 First Reliance at all.

8 THE COURT: It seems like I have a --

9 MR. PAYNE: Thank you, Your Honor.

10 THE COURT: It seems like I have a vague memory about
11 property that talks about an animal that's called deed of
12 trust. We don't have it in South Carolina. Some states do.

13 MR. PAYNE: Right.

14 THE COURT: I think maybe North Carolina does that.
15 That might be -- that might be a little bit different than
16 what you --

17 MR. PAYNE: Totally different world as far as what
18 you're entitled to do under that situation.

19 And the last thing is when -- in these foreclosures of
20 strip centers, it is very typical that you enforce the
21 assignment of rents because the borrower is not paying. It's
22 not fair to let him keep collecting the rents.

23 So you do as Mr. Yarborough did here. You -- you file
24 the motion to collect those rents. And then the most logical
25 person to collect them is the property manager that's

1 managing the property. Mr. Blanton knew the people. He's
2 already got it in his system. He's collecting the rents.

3 All he does is send us a check. He's not our agent,
4 even in August. I know the order wasn't signed until
5 October, but he's got no authority to bind us on anything.
6 The court order that was entered months after the lease said,
7 yes, send them the rent, and that's what happens all the
8 time.

9 Anyway, I just wanted to make those few points.

10 THE COURT: Very good. Mr. Le Clercq, I'd be glad to
11 hear from you. I believe you might be on mute.

12 MR. LE CLERCQ: Judge, I'm sorry. Could we take a brief
13 -- a brief bathroom break and I'll be right back?

14 THE COURT: Sure.

15 MR. LE CLERCQ: All right.

16 THE COURT: We'll take about a -- we'll take about a
17 two-minute recess. How about that?

18 MR. LE CLERCQ: Yes, sir.

19 THE COURT: I'll do the same.

20 (WHEREUPON, there was a pause in the proceedings, after
21 which the proceedings resumed as follows.)

22 THE COURT: All right. Is everybody ready? Very good.
23 All right. Mr. Benjamin Le Clercq?

24 MR. LE CLERCQ: Thank you, sir.

25 Judge, the Bank's case has got a lot of holes in it and

1 their ship is taking on water and one of the holes that we
2 just heard out of Mr. Payne's mouth -- I think he's at a
3 different firm from -- from Ms. Houghton. He said that the
4 Bank does not have the right to lease the property. Ms.
5 Houghton admitted that they do have the right to lease the
6 property.

7 And you can look in vain through any of the documents
8 that they've filed to try to find evidence that they didn't
9 have the right. They did have the right to lease the
10 property, and Ms. Houghton has admitted that had they leased
11 the property that that lease would've survived the
12 foreclosure.

13 That is the dispositive point here. The Bank had the
14 right to lease the property and there is a lot of evidence
15 that they did, in fact, enter that lease with Timmons and
16 that it survives the foreclosure. And even if they didn't,
17 they ratified it.

18 So there are some new points here that I'd like to
19 discuss that -- and I'm glad that there was -- there was some
20 discussion at the last hearing of the fiduciary obligations
21 of Blanton in this case because we've looked at that, as well
22 as talked with others, Karl Folgens, and they provide a more
23 robust argument even than what we had before.

24 And specifically this, Blanton was a dual agent. Dual
25 agency is allowed under the law of South Carolina.

1 THE COURT: All right. Now, it seems like we're kind of
2 -- it seems like we're kind of getting into the liability of
3 Blanton.

4 MS. LE CLERCQ: Right.

5 THE COURT: But we really want to focus mainly on the
6 Bank at this juncture and we're going to have an opportunity
7 to hear about that at a later date.

8 MR. LE CLERCQ: Okay. Well, the thing is is that
9 because Blanton was acting as the agent for the Bank and
10 actions that Blanton does --

11 THE COURT: What evidence do you have that they were
12 acting as an agent of the Bank and not of the original
13 lessor?

14 MR. LE CLERCQ: Well, the first evidence is in their --
15 in the motion to -- to assign rents. Let me share my screen
16 with you, Judge. All right. It says I'm sharing my screen.

17 All right. So the first evidence that -- that they were
18 acting as the agent for the Bank comes in the motion itself,
19 which is when they -- this is, again, what they send to First
20 Reliance Bank. I'm sorry. First Reliance Bank sends this
21 and hand-delivers it on Blanton and it says you will -- and
22 it uses the word agent.

23 Okay. Pursuant to South Carolina Code Section 29-3-100,
24 which as we know is the duty to act in a commercially
25 reasonable manner, they are asking -- in this case, what

1 they're asking for is that the existing agent become their
2 agent, and that's very, very important because as we've cited
3 in our -- in our brief on summary judgment, that when that
4 happens, when you have a property manager that is managing
5 property and collecting rents, they are an agent as a matter
6 of law.

7 And so what do you do? What happened at the hearing?
8 Let's look at what the -- at what happened at the hearing on
9 the assignment of rents.

10 Okay. So the fact is that Coit Yarborough made
11 representations to this Court that the Bank is judicially
12 estopped from denying because he said that -- that at the --
13 at the actual hearing -- let me pull it up, Judge.

14 All right. It occurs -- the hearing occurs on September
15 30th, 2015, and it is Exhibit 31. Here it is, HRG. Coit
16 Yarborough. This is -- this is representations from the
17 Bank's counsel to this Court.

18 There are other potential leases sort of up in the air
19 and something needs to be done to, you know, to consummate
20 the leases or reject the leases.

21 I would note that Atlantic's counsel was not at this
22 hearing. Nobody is talking with Atlantic about who is going
23 to consummate the leases, and that's important because he
24 then says -- and again, this is the subject of judicial
25 estoppel.

1 We would like to employ The Blanton Company to collect
2 the -- to collect the leases and to manage the property, as
3 they have been doing all along, on behalf of the Bank as well
4 as the owner pending this action, and we want the rents paid
5 over to First Reliance Bank.

6 Judge, that is a confirmation of the facts on the ground
7 and in fact --

8 THE COURT: Ms. -- Ms. Houghton --

9 I understand that point.

10 Ms. Houghton, what do you have to say about that?

11 MS. HOUGHTON: Yes, Your Honor. So we -- we respond to
12 this argument in the supplemental brief that we filed on
13 Monday. So, you know, I mean the hearing transcript --
14 obviously, the comments are what they are.

15 I would note first that this hearing transcript is dated
16 September 30th, 2015. It's over a month after the plaintiff
17 executed his lease with The Blanton Company and, again, the
18 focus of the Court's inquiry is, was The Blanton Company
19 acting as the agent on August 20th, 2015, when he entered into
20 the lease --

21 THE COURT: I see that.

22 MS. HOUGHTON: -- with The Blanton Company.

23 THE COURT: I understand. Go ahead. Go ahead, Mr. Le
24 Clercq.

25 MR. LE CLERCQ: Well, what -- what's incredible, Judge,

1 is that, again, both Dale Porter and Rick Saunders threw Mr.
2 Yarborough under the bus in their depositions by -- by saying
3 that, well, he didn't have authority to do that. And if you
4 look at -- at -- let me pull up Ms. Houghton's supplemental
5 filing. Let's see.

6 I'm sorry. Sorry, Judge. I got the wrong one.

7 THE COURT: That's all right.

8 MR. LE CLERCQ: Supplemental motion memorandum at page
9 11 through 13. All right. Here we go.

10 So again, here's -- here's this allegation that -- that
11 The Blanton Company did not have -- was the agent or property
12 manager for First Reliance Bank during the foreclosure
13 action, and we heard it directly from Ms. Houghton's mouth
14 today that they didn't do that.

15 It is directly at variance with what Coit Yarborough
16 said at the hearing, and that is -- that is a matter of
17 judicial estoppel. The Bank is trying to play fast and loose
18 with -- with the law. They have taken a position in related
19 litigation that they are now estopped from denying and, in
20 fact, Blanton admitted that -- that he was, in fact, the
21 agent beginning on July 24th. We've cited his discovery
22 responses to that effect, but from then on, he was acting as
23 the agent of the Bank and, in fact, Judge --

24 THE COURT: What do you have to say about the fact that
25 the lease took place prior to the hearing and to a later

1 arrangement between Blanton and the Bank?

2 MR. LE CLERCQ: Well, the fact is that, again, the --
3 what you do at a hearing, Judge, is you go and argue for the
4 points that you've asked for in your motion. So the judge --
5 the Bank has asked as of July 24th, which is before the lease,
6 they have asked that Blanton be their agent, and they confirm
7 that that in -- when he becomes a -- when Coit Yarborough
8 represents to this Court that Blanton will be the property
9 manager.

10 What do property managers do? They rent property. And
11 so when you -- a very important agency point, which is --
12 which is set out in our -- in our materials, and that is that
13 agents have not only the -- the specific authority that
14 they're given, but that which is necessarily implied by -- by
15 their mandate.

16 And -- and -- and Blanton testified repeatedly that as a
17 property manager, he is charged with getting the property
18 rented. And he testified that he was told by the Bank, by
19 Porter and by Coit Yarborough to get the property leased, and
20 that was in the three-way meeting that happened within a week
21 or so of July 24th, 2015. He's testified to that meeting and
22 he testifies that he was told to get the property leased and
23 then we'll decide what to do with it later. That is a
24 specific mandate. It's a specific authorization of agency.
25 If they --

1 THE COURT: All right. Ms. Houghton? Ms. Houghton,
2 what do you have to say about that?

3 MS. HOUGHTON: Yes, Your Honor. As an initial point, I
4 mean obviously Mr. Porter or Mr. Yarborough through Mr.
5 Porter's deposition testimony, through Mr. Yarborough's
6 affidavit testimony dispute that any instructions of that
7 nature were ever given to The Blanton Company. So, you know,
8 in terms of the plaintiff's motion for summary judgment,
9 that's -- that's a moot point.

10 In terms of our motion for summary judgment, you know,
11 when you look at what Mr. Blanton's deposition testimony was
12 -- and I think we specifically address this in our
13 supplemental brief. Mr. Blanton -- first of all, the timing
14 of when that meeting occurred and when Mr. Blanton says, you
15 know, what I recall is that the Bank told me at one point
16 they wanted to get the property leased, it's unclear from Mr.
17 Blanton's testimony when he asserts that that happened.

18 What his actual testimony on that point is when the Bank
19 took it over, this is what they said. You know, he could be
20 referring to -- you know, to when the Bank actually became
21 the owner of the property.

22 THE COURT: Does that -- does that create a question of
23 fact in your mind?

24 MS. HOUGHTON: No, Your Honor, it does not. It does not
25 create a question of fact because, one, if that statement

1 occurred after the Bank -- you know, after Mr. Timmons
2 executed his lease, it's irrelevant to the inquiry of whether
3 Mr. Blanton was acting as the Bank's agent on August 20th,
4 2015. Second, you know, Mr. Blanton's deposition testimony
5 is contradictory.

6 So at one point -- if you'll give me just a moment to --
7 to find it and, you know, in defense to Mr. Blanton, again,
8 the deposition was, like, 16 hours. It took place over two
9 days and at one point -- oh, okay.

10 So Mr. Blanton testified first -- he said -- I'm sorry.
11 If the Court will permit me just a moment to look at my notes
12 on this.

13 So Mr. -- Mr. Blanton testified that he had a
14 conversation with Atlantic Regional after the foreclosure was
15 filed and said, hey -- this is with Atlantic Regional. Let
16 me know what you're doing, when you're getting out of here so
17 I can talk to the Bank and see if they want to lease the
18 space.

19 These are direct quotes. This is page 103 of Mr.
20 Blanton's testimony.

21 Atlantic Regional told him they were vacating the
22 property and Mr. Blanton says, but again, I wasn't involved
23 with their affairs with the Bank. I was waiting to be told
24 what to do.

25 Mr. Le Clercq asked Mr. Blanton, after your conversation

1 with Richard Cooke, did you talk to the Bank? And Mr.
2 Blanton says after I knew there was a foreclosure, I had to
3 speak with them and my recollection is they -- my
4 recollection is they said, no, we don't want to lease it. We
5 want to sell the property.

6 So Mr. Blanton testifies that the Bank told him at some
7 point they didn't want to lease the property and then at
8 another point in his testimony, Mr. Blanton said -- you know,
9 the portion of testimony that Mr. Le Clercq is referencing
10 says I was caught between several different roadblocks here
11 trying to figure out what to do. At one point in time,
12 Atlantic Regional was telling me, you know, rent the building
13 to get as much income as we can. When the Bank took it over,
14 my recollection was -- is, you know, lease what you can and,
15 you know, let's get the income coming in until we decide to
16 sell it or continue to manage it.

17 Again, I think the phrase "when the Bank took it over"
18 means, you know, that that likely refers to, you know, after
19 the Bank became the owner. This is all disputed by the Bank,
20 of course, but even if you can take this ambiguous testimony
21 and say, well, it could create an issue of fact as to whether
22 First Reliance Bank made some comment to The Blanton Company
23 that it was or wasn't in favor of leases, it doesn't change
24 the legal relationships that existed between The Blanton
25 Company and First Reliance Bank.

1 It doesn't change the fact that First Reliance Bank was
2 a creditor, was a lienholder, was merely receiving the rents,
3 and that The Blanton Company did not begin to act as agent
4 for First Reliance Bank until well after the time that the
5 plaintiff executed his lease on August 20th, 2015.

6 So no, I do not think that this ambiguous contradictory
7 testimony creates an issue of fact that precludes summary
8 judgment on behalf of First Reliance Bank.

9 THE COURT: Mr. Le Clercq?

10 MR. LE CLERCQ: Judge, I'm sorry to say I think that
11 that's a misrepresentation of what the testimony is. And so
12 let's actually look at Blanton's testimony, which is Exhibit
13 17. Okay. This is what -- this is at page 188. This is
14 what Ms. Houghton just referenced.

15 Okay. This is Ben Le Clercq asking. The question I've
16 got is only did you have a conversation with Dale Porter
17 regarding the prospective lease for Timmons for this property
18 prior to August 20th? All right. The lease is on August the
19 20th. I asked him did Blanton have a conversation with Dale
20 Porter at the Bank regarding the prospective lease of Mr.
21 Timmons? Answer: I think that I did. That's the answer. He
22 thinks that he did.

23 What do you -- and tell me what you recall from that
24 conversation? Okay. So he talks about Atlantic saying --
25 telling me, you know, rent the building. That's before they

1 were out of business, Judge.

2 All right. But when the Bank took it over -- and what
3 does that mean when the Bank took it over? And the next
4 quote that we're going to go to from Mr. Blanton -- let me
5 get this quote out first though.

6 He said lease what you can and, you know, let's get the
7 income coming in until we decide to sell it or continue to
8 manage it. And subsequently, you know, we don't want to
9 continue to hold it. We want to sell it. And your main
10 contact at the bank was Dale Porter? Okay.

11 So there is a very critical fact and -- and there is --
12 the heart of the reason why we think that the Bank's argument
13 is deceptive is because everything in their argument is
14 premised on Atlantic being the lessor, and they were not the
15 lessor. Okay?

16 The reason that there's these communications between
17 Blanton's lieutenants and others is because none of them had
18 ever done a foreclosure before. They had never once in 41
19 years managed a property in foreclosure, and Blanton himself
20 testified that he was covering both of his bases. So he
21 contacted everybody.

22 And so he says -- let me go to the -- the testimony at
23 page 103 is really important on that point because he says,
24 you know, we're talking about the time subsequent to July 24th
25 when you found out, and he says -- so let me go up -- let me

1 go up a little bit so that we're clear on exactly what's
2 happening. All right.

3 This is, again, on -- let's make sure that the record is
4 clear. Let me make sure that I understand what you said.
5 Once the foreclosure happened, I understood you to say that
6 you called Richard Cooke on a couple of occasions and the
7 gist of what you got out of that conversation was, point
8 number one, things weren't looking good and they were not
9 likely to stay in the building and title was likely to be
10 lost in foreclosure. Okay.

11 And he says we're out of here. All right.

12 And so we're talking about the time that he found out
13 about that subsequent to July 24th. All right. And so if you
14 skip down to page 102, I said -- this is, again, my question.
15 I won't hold you to it, but give me a range of the time that
16 you think the conversations with Cooke took place. Was it on
17 July 24th itself? Was it a week later? Was it a month? When
18 do you think it was?

19 He says there's no way I can answer that and it wasn't
20 on the day, but he -- listen to what he said. I guess he
21 called me or I called him and said, hey, you know, let me
22 know what you're doing, when you're getting out of here so
23 that I can talk with the Bank and see if they subsequently
24 want to lease, you know, to lease the space.

25 All right. So when the Bank was taking over, Judge, is

1 when the mortgage -- the mortgage itself -- mortgage -- and a
2 brief digression. Mortgage is a French word that means death
3 pledge. You either pay the mortgage and the mortgage goes
4 away or if you don't pay, your interest in the property dies.

5 And so that's what happened. Everybody knew that
6 Atlantic was out of business and, in fact, Blanton testifies
7 that he knew that they were out of business. And so he said
8 -- and this is what's interesting because I didn't read this
9 at the last hearing, but it's important and because he talks
10 about when they said they were moving out.

11 And so when he said that, this statement right here
12 starting at line 6 and going through line 10, let me know
13 what you're doing, when you're getting out of here, so I can
14 talk with the Bank and see if they want to lease the space,
15 that's who the lessor is because they are in charge.

16 I had the court reporter read back that last statement.
17 All right. And I said I want to make sure I'm clear on that.
18 Did you hear that? And I said that was you calling them,
19 meaning Atlantic, and them being Richard Cooke, and saying
20 let me know what you're doing so I can find out from the Bank
21 if they want to lease the property.

22 Okay. What was his response, if you recall? Answer --
23 and, Judge, remember when we're talking about. This is
24 sometime prior to August 17th and immediately after the
25 foreclosure of July 24th in the week or two.

1 He says we're moving out as soon as possible, moving
2 whatever furniture. They've already been moving some prior
3 to. So I knew it was coming down.

4 He knew that Atlantic was out of business. He knew that
5 they were going away. How could he possibly suggest in good
6 faith that he had a -- that he didn't have an obligation to
7 disclose that and that -- that someone that's out of business
8 is entering an 18-year lease with someone that's putting
9 their life savings into it?

10 Okay. Next question. Do you think that that took place
11 prior to July 31st? I'm not sure.

12 All right. Next question. Would it have been the first
13 two weeks after that? I can only tell you that I assume so.

14 He assumes that it's in the first two weeks after the
15 foreclosure, which is the -- or in the first two weeks of
16 August even, which is August 14th, which is before the August
17 17th proposal of Timmons.

18 So, Judge, that is where at its heart we think that this
19 is a deceptive position of the Bank and of Blanton and of
20 Plasma if they take that because what they're suggesting is
21 that an out-of-business party that's moving as soon as
22 possible, has already begun moving furniture, is actually
23 going to enter an 18-year lease.

24 And note that what Ms. Houghton said is not that the
25 conversations between Blanton's lieutenants had been with

1 Cooke or that there had been a conversation between Blanton
2 and Cooke, but it had been between Blanton's lieutenants, who
3 were just doing what they'd always done, and Cooke's
4 lieutenants.

5 And what's interesting, Judge, as an aside point is if
6 you look after February 4th, 2016, when the checks kept being
7 paid to the Bank, there were three or four checks after
8 February 4th, 2016, when Atlantic had no more interest, when
9 Blanton had still written on the name of the check Atlantic
10 Regional, when Atlantic Regional had no further interest.

11 So there's really nothing to this contact between
12 Blanton's lieutenants and Cooke's lieutenants. The real
13 critical inquiry is the -- is the communication between the
14 principals, which is Blanton and Cooke. Cooke tells Blanton
15 we're out of business and we're moving out and, in fact,
16 we've already begun moving out.

17 Now, there is a fair --

18 THE COURT: Ms. Houghton, what do you -- what do you
19 have to say about that line?

20 MS. HOUGHTON: Your Honor, you know, the -- I guess the
21 plaintiff has -- has put forth several arguments. So which
22 argument in particular would the Court like to hear from me
23 on?

24 THE COURT: His last point about -- about discussions
25 between --

1 MS. HOUGHTON: Yes, Your Honor. I understand that --

2 THE COURT: -- between --

3 MS. HOUGHTON: -- what really counts is Mr. Blanton's
4 communications with Mr. Cooke, as opposed to --

5 THE COURT: Right.

6 MS. HOUGHTON: -- the emails back and forth.

7 Well, Your Honor, I mean the fact is that Mr. Blanton
8 testifies, you know, I commonly dealt with Rick Cranford on
9 issues relating to the lease, relating to leases and
10 prospective tenants, and I'm trying to find the deposition
11 testimony real quick of Mr. Blanton on this issue where he
12 says, you know, very clearly -- I'm sorry. One moment. Let
13 me --

14 Mr. Blanton testifies very clearly. He says -- and this
15 is on page 117 of Volume 2. So I can -- I can share my
16 screen and show the Court the -- the precise deposition
17 testimony. I think Ben still has his screen up. So I'll
18 just quote it.

19 Mr. Blanton testified I think -- again, I think Atlantic
20 Regional was struggling so bad, saying, you know, hey, man,
21 get a tenant in there, get a tenant in there. The plaintiff
22 and I have known each other. We spoke back and forth and
23 when it came available, he and I worked out terms that we
24 thought were acceptable and I passed that on to Atlantic
25 Regional and they thought it was acceptable, and then Mike

1 and I executed the lease.

2 You know, Mr. Blanton acknowledges that he was aware
3 that Atlantic Regional had been having some financial
4 difficulties. Of course, they were. They were being
5 foreclosed upon. This company was -- you know, I mean they,
6 obviously, weren't paying their bills, but despite that, he
7 was being told to rent the property and that's what he did.
8 And he specifically discussed the terms of Mr. Plaintiff's
9 lease with Rick Cranford, who he had commonly dealt with on
10 behalf of Atlantic Regional, and that lease was specifically
11 approved.

12 And this idea, you know, Your Honor, that it's a
13 deceptive position for the Bank to take to say that The
14 Blanton Company was acting as the agent of Atlantic Regional,
15 you know, as much as the plaintiff wants the Bank to have
16 been the agent or the principal of The Blanton Company, it
17 simply was not. There is no evidence. The plaintiff has not
18 cited any evidence.

19 The final exhibit foreclosure action did not support the
20 theory that the plaintiff puts forth. The evidence is that
21 Blanton continued to work for Atlantic Regional, despite the
22 fact of knowing, you know, of Atlantic Regional -- the fact
23 that it was obviously having some financial difficulty.

24 That doesn't change the legal relationships of these
25 parties as it relates to the property, it doesn't change the

1 fact that The Blanton Company entered into this lease on
2 behalf of Atlantic Regional, and it doesn't change the fact
3 that Atlantic Regional is the plaintiff's lessor and, you
4 know, they chose not to sue Atlantic Regional in this case
5 for reasons that are only known to the plaintiff.

6 MR. LE CLERCQ: Judge?

7 THE COURT: Mr. Le Clercq, you know, the notes that were
8 made on the preliminary terms of the lease was made by
9 Atlantic, wasn't it?

10 MR. LE CLERCQ: No, sir.

11 THE COURT: You don't agree with that?

12 MR. LE CLERCQ: In Blanton's testimony -- in Blanton's
13 testimony is that all of this handwriting except for right
14 here, which is Mike Timmons's signature, every single bit of
15 this handwriting, including Ray Coit Yarborough's telephone
16 number and his testimony that Blanton obviously spoke with
17 Ray Coit Yarborough about this lease proposal on August 17th,
18 2015, every bit of this writing is -- except for that
19 signature, is Joseph Blanton's writing.

20 And so --

21 THE COURT: I'll clarify. The handwritten dickered
22 terms, when you asked about that particular document, those
23 terms came from Atlantic, not from Coit Yarborough, didn't
24 they?

25 MR. LE CLERCQ: Well, the problem is, Judge, we --

1 that's a question that --

2 THE COURT: As a matter -- specifically, the three
3 months versus the six months. All of those things were being
4 negotiated with Atlantic, weren't they?

5 MR. LE CLERCQ: Well, Judge, at a minimum, there's a
6 question of facts. We don't think so because we think the
7 deceptive position to take the position that a company that
8 is out of business run by a convicted felon that's already
9 moving out could enter into an 18-year lease.

10 And to put some teeth on that argument, there's a very
11 important provision, which is this. And this is what we
12 looked into and which was not stated before, but the fact is
13 this.

14 That Blanton and also -- not just Blanton, because
15 Blanton is acting as the agent as the Bank is judicially
16 estopped from -- from saying. Blanton is acting as the agent
17 as of July 24th. Do you want to see the evidence of that?
18 That is in Blanton's own discovery responses. That as of
19 July 24th, Blanton is acting as the agent for the Bank and has
20 a contract with the Bank and, in fact, is paid by the Bank.

21 THE COURT: And the lease was dated what date again?

22 MR. LE CLERCQ: I'm sorry?

23 THE COURT: The lease was dated what date?

24 MR. LE CLERCQ: The lease is dated August the 20th. But
25 we're talking about Blanton's duties to -- and by extension,

1 the Bank's duties to Timmons prior to the time that the lease
2 is signed. And again, this is -- this is very clear in the
3 South Carolina Code, real estate brokers.

4 All right. So if you look at this provision, 40-57-30,
5 Section 16 -- sorry, I blew past it.

6 Material adverse fact means a condition or occurrence
7 that is generally recognized as significantly and adversely
8 affecting the value of the real estate, including -- and this
9 -- Judge, this is almost tailor-made for this case for Mike
10 Timmons.

11 Information that indicates that a party to a transaction
12 is not able to or does not intend to meet an obligation under
13 a contract or agreement made concerning the transaction.

14 Judge, that is the death knell of both Blanton's
15 position and the Bank's position because the South Carolina
16 Code is very clear that Blanton had a duty. And acting as
17 agent for the Bank, the Bank also has that duty and the Bank
18 has also a duty to act commercially reasonably, as we've
19 seen.

20 THE COURT: I think that goes directly to the -- to
21 Blanton's responsibility and liability, but, Ms. Houghton,
22 what do you have to say about whether or not that extends to
23 the Bank?

24 MS. HOUGHTON: Your Honor, you know, I mean that's --

25 THE COURT: That fiduciary duty, does it extend to the

1 Bank?

2 MS. HOUGHTON: Thank you, Your Honor.

3 No, Your Honor, we do not agree that that duty extends
4 to the Bank. I mean that's a -- you know, I can't comment.
5 You know, I haven't really had an opportunity to research
6 these statutes that are cited by Mr. Le Clercq because
7 they're really directed towards Mr. Blanton and Mr. Blanton's
8 duties as a real estate agent, which I, frankly, don't know
9 anything about and I'm sure that's something that Mr.
10 Blanton's counsel could comment on.

11 The Bank's position is that it doesn't matter what
12 duties, if Blanton had any duties to the plaintiff. That
13 those duties are between Blanton and the plaintiff, and we're
14 not saying Blanton did have those duties. We're not, you
15 know, but if they existed, that's a matter between Blanton
16 and the plaintiff. Mr. Blanton was not acting as the agent
17 of the Bank.

18 You know, the plaintiff has cited only some, you know,
19 conclusory discovery responses from Mr. Blanton where he
20 says, you know, I was acting as the agent of the Bank. Those
21 conclusory statements of law, I was acting as an agent for
22 the Bank, are not supported by the specific deposition
23 testimony. They're not supported by the legal relationships
24 that existed between these parties, and I feel like I've
25 probably beat that -- that horse enough to the Court.

1 But the fact of the matter is Blanton simply wasn't the
2 agent of the Bank at the time he entered into this lease with
3 the plaintiff. So any duties he may have had are not matters
4 that concern the Bank.

5 THE COURT: Okay.

6 MR. LE CLERCQ: Judge, we've cited -- we've cited a
7 bunch of evidence directly to the contra of what Ms. Houghton
8 has just said. There is a ton of agent -- of evidence that
9 he was, in fact, the agent, starting, of course, with Coit
10 Yarborough's representation to this Court that Blanton was
11 the agent and the property manager of the Bank.

12 Property managers rent property. They have all of the
13 authority that is necessarily implied by that, which Blanton
14 testified to at length. Property managers rent property.
15 His mandate from the Bank was to get the property rented and
16 he's testified that in his deposition and he was the agent.

17 Joseph Blanton was present at the hearing on September
18 29th when the Bank held him out to the entire world as their
19 agent. And when he said we want this guy to be our agent and
20 the property manager, which is only confirming the facts on
21 the ground which had existed since July 24th when they asked
22 that Blanton become their agent. And they didn't use the
23 word property manager, but that's what -- what is clear from
24 the hearing that's what they intended and so the fact is that
25 at that point he was their agent.

1 And if you look at the Elite Laser Tag lease, which is
2 yet further evidence that the Bank is out there and
3 particularly Coit Yarborough is out there having people
4 authorize, you know, stuff on his behalf. This is Joe
5 Blanton's handwriting on October 15th. Call Coit Yarborough.
6 He said to proceed with the lease and hold the rents in
7 escrow until court order, 10/8/15.

8 Judge, we don't have the same document for the lease,
9 but at a minimum there is a question of fact as to whether
10 Coit Yarborough said the same thing to Blanton at the time
11 because Blanton is adamant on one point and that is this. He
12 said -- and let me find it because it's -- it really is very
13 important.

14 So he said take my license if I didn't tell the Bank.
15 And this is at Exhibit 16 at page 125. All right. So -- all
16 right.

17 So the first point is -- and I'd like to circle back
18 around to, you know, to this because, again, Blanton said,
19 you know, let me know. He said we're getting out of here.
20 At any rate, he says -- all right.

21 I asked him, we've got this lease signed between Timmons
22 on August 20th, 2015. I'd call it a long-term lease. Would
23 you agree with me that you would not have let Timmons sign
24 that lease knowing that the property was in foreclosure
25 unless you had also told the Bank about the proposed lease?

1 He says there's no way that I would have ever done that.
2 That -- and if I did, take my damn license. Excuse me,
3 Judge. Take my license away from me. I would not do that.

4 And so, you know, there is a lot of evidence that --
5 that Blanton was, in fact, the agent. Again, Blanton says he
6 was the agent and he had a contract with the Bank, that he
7 was paid. And, Judge, follow the money. All of the money
8 for occupancy on the -- on the property from July 24th
9 subsequent, every single nickel was paid to the Bank. That,
10 of course, gives the Bank a very important and vested
11 financial interest in getting the property rented.

12 Which brings to the next point, which is the right to
13 collect rents and to enter leases on the property, as Ms.
14 Houghton has already admitted exists and has also admitted
15 that if the Bank were a party, that it would survive the
16 foreclosure. That's the torpedo that sinks their case,
17 Judge, because she's admitted that -- that if the Bank were a
18 party, then the lease survives the foreclosure because it is
19 axiomatic that a foreclosure only affects the rights of
20 junior lien holders.

21 Look at the *Lis Pendens*. Look at the foreclosure. Who
22 is the plaintiff? And who is the defendant? The foreclosure
23 closes the interest of Atlantic. It only augments and
24 burnishes and improves the Bank's interest.

25 And to rule for them, you would have to rule directly

1 against what Dale Porter himself said in his deposition,
2 which was that the Bank had the right to enter a 30-year
3 lease, but in the post-foreclosure filing, pre-foreclosure
4 sale period, they could've entered that 30-year lease if they
5 wanted to. He says that they didn't, but they did have the
6 right. And what we have today is an admission from counsel
7 that if the Bank had been the lessor, if they had been a
8 party to the lease, that the lease survives.

9 So the point is this, Judge, if anyone wins summary
10 judgment, it's only the plaintiff because if the Court
11 decides that the mortgage means what it says it means, then
12 judgment as a matter of law for the plaintiff because the
13 mortgage, the death pledge, says grantor presently assigns to
14 lender all of grantor's right, title, and interest in and to
15 all present and future leases of the property.

16 So if anyone wins summary judgment, it's on that basis
17 because the -- the rights -- the -- the tenants' rights --
18 I'm sorry. Atlantic's rights in the property were
19 transferred to the Bank and, as Ms. Houghton said at the last
20 hearing and which she has not contradicted today, she has
21 found nothing in the law of South Carolina that precludes
22 that.

23 And, Judge, all I can say is think of the legion of
24 residential and commercial borrowers that have lost their
25 homes and lost their businesses because these -- the terms of

1 these documents were strictly enforced by the Bank. They
2 have to be strictly enforced here. This -- this mortgage was
3 recorded and noticed to the world as a matter of law that the
4 Bank was doing that highlighted language.

5 But moreover, Judge, it's not only in the assignment of
6 rents that they have the right to lease the property, it's
7 also in the mortgage. And Ms. Houghton failed to mention
8 when she was talking about the rights and remedies on default
9 of what they can do.

10 Again, it's to collect the rents, but it is also to make
11 payment. That they have the right to lease the property and
12 it is said -- it is set out right here they can appoint a
13 receiver, but they can -- they can collect the rents. They
14 can take possession of the property. They don't have to take
15 possession of the property to rent the property, but they can
16 if they want to. And they have -- they have the right to
17 lease the property.

18 And so if they do that, then it is the -- you know, they
19 can accelerate the indebtedness, which is what they've
20 testified that they always do, and it puts them in a position
21 of dominance and control. And the fact is if there were a
22 transfer of that interest, as I think Ms. Houghton has
23 acknowledged, she says, well, the commensurate obligations
24 don't come with it. No, sir. That -- it -- the commensurate
25 obligations do come with the transfer of the interest.

1 You can't have both of them. Somebody's on first base.
2 You don't have two runners on first base at the same time.
3 The Bank was in charge and everybody knew it.

4 THE COURT: All right.

5 MR. LE CLERCQ: And Blanton knew it.

6 THE COURT: All right. It seems like I've got a pretty
7 good handle on -- on that issue.

8 Mr. Oxner, I'd be glad to hear from you. Mr. Oxner?

9 MR. OXNER: Can you hear me now?

10 THE COURT: Yes.

11 MR. OXNER: Okay. Are you ready to hear from me on --

12 THE COURT: Yes.

13 MR. OXNER: -- my motion for summary judgment?

14 THE COURT: Yes.

15 MR. OXNER: Okay. If it please the Court, Your Honor,
16 all of these arguments that are going on between Mr. Timmons,
17 the Bank, and Blanton, my client, WW Plasma and Hunter
18 Williams, who is a member of an LLC, don't have anything to
19 do with it.

20 As you know -- and I'm going to try to condense this
21 down. You know, I could go on for hours like these other
22 guys have gone on, but you've heard it. So I don't want to
23 bore you with it.

24 But this whole thing starts off -- and my brief, by the
25 way, shows November 2014 for the *Lis Pendens*, which is wrong.

1 It's really July 20th, '15, which is accurate.

2 There's a timeline of undisputed facts and we start off
3 with July 20th, 2015, when the *Lis Pendens* and foreclosure
4 action is filed. Timmons signs the lease, as you know, on
5 August 20th, 2015. We've got a judgment of foreclosure on
6 December 3rd, 2015, in which you've heard before -- I'm going
7 to say it again. The judgment extinguishes Timmons's lease
8 as a matter of law by providing that Atlantic and all persons
9 whomsoever claiming under him, them or it be forever barred
10 and foreclosed of all right, title, interest, and equity and
11 redemption in the said mortgaged premises so sold or any part
12 thereof.

13 So we get on to February 4th and that's when the -- '16.
14 That's when the Bank purchases the site at auction. January
15 27th of 2017, a whole 'nother year, Plasma purchases the site.
16 They purchased it free and clear.

17 You've heard the -- the testimony about that these
18 leases have to -- because it's more than a year and Mr. Le
19 Clercq has made a big point that this is an 18-year lease.
20 Clearly, it's more than a year. The statute states it must
21 be recorded. Okay?

22 So my client comes in. He buys the property from the
23 Bank, not in foreclosure, and he does a chain of title and
24 there's no lease in the chain of title and he is comfortable
25 in the fact that this property was foreclosed and anything

1 that might be out there has been extinguished. He knows
2 that. His lawyer tells him that.

3 And if that is upset, then nobody in the banking world
4 or in the buying world is ever going to purchase a piece of
5 property again from a foreclosure sale. All those titles are
6 going to be upset. Can you imagine what would happen in
7 2008, '09, '10, when we had all of those foreclosures going
8 on? That all of those pieces of property are now tainted and
9 transactions couldn't occur? That would be terrible.

10 So on February 6th, 2017, which is literally 10 days or
11 less -- I'm going to try to share it with you. This is very
12 important. Okay. Do you see that February 6th letter?

13 THE COURT: Yes.

14 MR. OXNER: Okay. This is the letter sent 10 days after
15 Plasma bought the property by my partner, Dan Stacy, and it
16 states that your leases are subordinate to the liens of
17 mortgage and, therefore, became month-to-month. My client
18 does not wish to continue the tenancies with any of you with
19 respect to the shopping center, as their redevelopment plans
20 will not accommodate your current use. Please allow this to
21 serve as your 30-day termination notice such that you will
22 need to vacate the property on or before March 13th, 2017.

23 Now, the reason that becomes very important is,
24 unfortunately, Mr. Le Clercq and his client have thrown
25 Plasma and Hunter Williams into eight intentional torts:

1 fraud, misrepresentation, tortious interference, duh duh duh
2 duh duh. I'll go through those if Your Honor likes.

3 As Ms. Houghton has already stated, it's no longer a
4 mere scintilla. It's a heightened level of burden of proof.
5 It is clear and convincing.

6 There cannot be any misrepresentation as to what is
7 going to occur with this property when this letter was
8 received by Mr. Timmons 10 days afterwards and tells them
9 explicitly you're not going to be there, you need to leave
10 within 30 days. And Mr. Timmons has a lawyer, Clarence
11 Davis, who is an ex-US attorney, a highly touted lawyer, who
12 advises him on what to do, and that'll become more important
13 later in my argument.

14 On May -- June of '17, Timmons vacates the property and
15 on June 30th, 2017, Timmons and Plasma execute a release, and
16 Timmons signs a release in exchange for \$10,322.58 on the
17 advice of counsel and highly negotiated.

18 So at any rate, those are the undisputed facts. Nobody
19 is going to dispute any of those facts.

20 One of the things I would say -- I'm just kind of trying
21 to cut to the chase here, Your Honor, is this whole idea that
22 poor Mr. Timmons should -- you know, that Blanton or the Bank
23 should have told him about this foreclosure. The law is
24 clear that he's got to go out there and protect his own
25 investment, especially in a commercial lease. He doesn't do

1 that.

2 That *Lis Pendens* and foreclosure is out there. There's
3 testimony -- and Mr. Le Clercq likes to point out about the
4 Laser folks. Why didn't the Laser folks ultimately ever
5 lease from them? Because they found out and went to the
6 courthouse and found out about the foreclosure and *Lis*
7 *Pendens* out there. They said we're not going to lease that
8 property. So another commercial interest did the
9 commercially reasonable thing and they went out there and
10 they checked the courthouse steps, which they are allowed to
11 do.

12 Also, Mr. Timmons testifies at his deposition. He
13 admits that he did not protect his investment or his tenancy
14 by doing due diligence. He says I didn't care who owned the
15 property. Maybe I should have done due diligence, I guess,
16 as y'all say. He further says -- and I put all my eggs in
17 the basket. It didn't work out.

18 Mr. Timmons has to be charged with some responsibility
19 here. Certainly, my client has nothing to do with anything.
20 They bought it free and clear of any and all encumbrances,
21 and the lease was not recorded. It isn't there. It's a
22 month-to-month, and subsequently, of course, the -- the -- it
23 becomes month-to-month anyhow.

24 On the breach of contract count, Your Honor, there is no
25 contract. There is no imputed contract. There is no lease

1 between my client and Mr. Timmons. It's month-to-month and,
2 as you can tell from the -- from what's still on the screen,
3 we gave them immediate notice that we're going to terminate
4 within 30 days.

5 One of the things that Mr. Timmons has to prove for
6 breach of contract is he's got to prove and cannot prove his
7 special damages. He alleges loss of earning capacity and all
8 these other things that aren't the special damages that he
9 has to plead, which he did not do, and he has to prove.

10 And one of the things that he -- reasons he can't do
11 that is because it's not foreseeable. Timmons cannot recover
12 them because at the time the lease was formed in 2015, Plasma
13 was not in the picture here. It could not have foreseen the
14 damages.

15 Also, Timmons admits that his claimed duress was
16 financial in nature. And by May of 2017, one month before he
17 signed the release, things had gotten so desperate that
18 Timmons was forced to sell his grandmother's diamond ring.
19 He also sold many other treasured possessions to try and
20 survive. That is -- has nothing to do with Plasma.

21 And in my -- this brief and in my previous brief, Your
22 Honor, that I put in here and incorporate by reference is the
23 Cox case. It says financial duress is not a reason to void a
24 settlement agreement or a contract. That that can't be the
25 duress. Also, there is no -- there is no proof, zero proof,

1 that there is any duress other than Mr. Timmons's self-
2 serving testimony and affidavit after-the-fact of the
3 deposition.

4 Your Honor, I can go through all of the intentional
5 torts. I, quite frankly, don't know how in the world Mr.
6 Timmons can get by summary judgment on the intentional torts.
7 My clients have had one conversation with Mr. Timmons. The
8 lease was not even in existence and the official statement 10
9 days after they had purchased the property was that we're not
10 going to continue on with this month-to-month lease.

11 So I don't know how in the world. To date, I have yet
12 to see any evidence whatsoever, certainly not clear and
13 convincing evidence, that Mr. Hunter Williams and Plasma did
14 anything that has anything close to fraud, misrepresentation,
15 tortious interference, etc. I can go through each one of
16 those elements if you want, Your Honor.

17 THE COURT: I think we -- I think we're in pretty good
18 shape with that. Let me hear what Mr. Le Clercq has to say
19 about your position.

20 MR. OXNER: Okay.

21 MR. LE CLERCQ: Judge, let me say first that it's -- and
22 this is really important. I should have objected right at
23 the -- at the start, like Ms. Houghton did last time.

24 Mr. Oxner shouldn't be given a second bite of the apple.
25 This has already been decided. He's already moved for

1 summary judgment and summary judgment was denied. Okay?

2 If he wants to take that up with the -- with Judge
3 Nichols that decided that, he can do that, but it is not
4 appropriate for the summary judgment that has already been
5 decided and ruled on and argued all the issues relating to
6 the relief and anything else that he wanted to bring, you
7 know, was -- was decided at that time. So we object to the
8 -- to that.

9 We have not responded yet to his. We would like the
10 opportunity to because we've been busy with -- with Blanton's
11 response and with this one, but we would like the
12 opportunity. If the Court is inclined to nevertheless
13 entertain what should be a motion to reconsider, we would
14 like the opportunity to brief.

15 THE COURT: Mr. Oxner, is that -- is that true that
16 summary judgment has, indeed, been denied?

17 MR. OXNER: Well, two things, Your Honor. Number one,
18 the summary judgment that was brought in front of Judge Seals
19 was only as to the enforcement of the settlement agreement.
20 It had nothing to do with the merits of the claim. We
21 weren't through with depositions. So that's number one.

22 Number two, the case of *Brown v. Pearson* and lots of
23 other cases states that a -- the summary judgment motion --
24 that we see no merit in the contentions that summary judgment
25 was improper because a prior motion for summary judgment

1 which raised the same issues has been denied.

2 Case law and CJS and everywhere else says -- I didn't
3 know this, Your Honor. You can bring it back up again, but
4 most importantly, the only thing that was brought up in the
5 first one -- so it's very disingenuous for Mr. Le Clercq to
6 say that -- was about the settlement agreement. That's all I
7 argued. You can go look at the brief, which you've got.
8 It's all about the settlement agreement.

9 And I submit to Your Honor because of this case law that
10 I can reargue about the settlement agreement because, quite
11 frankly, I don't know how in the world I don't get summary
12 judgment on that when it was negotiated with a highly touted
13 lawyer. He got the money and never returned it. He
14 testified it was free and voluntary. He testified it was no
15 misrepresentation.

16 He testified that -- that he was -- they changed the
17 settlement agreement to only be possible because he was going
18 to go after it and everybody understood he was going to sue
19 the Bank and Blanton. He knew all that. The only thing that
20 they did was give him the money, which we still haven't seen
21 it back, but that issue has been --

22 THE COURT: How much? How much was that, by the way?

23 MR. OXNER: Excuse me?

24 THE COURT: How much was the settlement?

25 MR. OXNER: It was 10,000 and some change.

1 THE COURT: How much?

2 MR. LE CLERCQ: It was -- sorry.

3 MR. OXNER: 10,000 and some change.

4 THE COURT: Okay. All right.

5 MR. LE CLERCQ: It was the amount that he had paid in
6 rent and the fact is is that, again, this has already been
7 decided by Judge Seals. And when we gave him the litany of
8 the evidence of duress, the mountain of evidence of duress
9 that Timmons was in, the judge said I've heard enough and
10 summary judgment was denied.

11 And so Mr. Oxner is taking a second bite of the apple
12 and it's inappropriate. If he wants to -- he could've filed
13 whatever he wanted on summary judgment at that time and he
14 took his shot and his shot was denied. And if he wants to
15 take it up with Judge Seals, let him go back and take it up
16 with Judge Seals, but it's -- it's not appropriate in this --
17 in this context, Judge.

18 THE COURT: All right.

19 MR. OXNER: Your Honor --

20 THE COURT: Well, it seems to me that that might have to
21 do with the settlement agreement itself but not the merits of
22 the underlying claim, but at any rate, anything further from
23 anybody?

24 MR. LE CLERCQ: Well, Judge, what I would say is if the
25 Court is inclined to review the issues that Mr. Oxner has

1 brought up, we think effectively that the positions that are
2 set out in our documents respond to -- to theirs.

3 The point is this. As goes the Bank, so goes Blanton.
4 I'm sorry. So goes Plasma for one very important reason, and
5 that is if I can just -- let me briefly.

6 Mr. Oxner, if you can stop sharing your screen, I want
7 to share my screen with -- with the Court because there is --
8 there is a very important point, which is -- all right. So
9 let's do this.

10 What happens in South Carolina when you have a purchase
11 of property? The -- when the -- when the property is
12 purchased -- there it is. All right.

13 27-35-50, sale of real estate under the lease. If there
14 was a lease with the Bank when the real estate was sold while
15 under the lease -- and let me -- let me be clear that Mr.
16 Oxner -- the reference that Mr. Oxner made to the citation of
17 his statute, he left out the fact that -- that his client had
18 notice of my guy's lease.

19 And so they get no benefit whatsoever from the statute
20 that they claim. They knew all about the lease. The lease
21 is what held up the closing with Plasma and the Bank while
22 they negotiated. At the end of the day, the only reason that
23 his client closed is because they got an uncapped
24 indemnification from the Bank.

25 And, Judge, you will not be surprised to hear based on

1 what you've heard already that the Bank has not honored its
2 obligations under that uncapped indemnification, despite
3 requests by Mr. Oxner and his firm that they do so. They
4 haven't done it.

5 But the point is this. When the -- at the moment of the
6 transfer, the lease that the Bank had with Timmons
7 transferred as a matter of law under this section and a
8 relationship of landlord and tenant is created *ipso facto*.
9 It's between the purchaser and the tenant as if the purchaser
10 had been the landlord in the first instance, and the
11 purchaser shall be entitled to all benefits and rights, but
12 also the tenant has all benefits and rights that they would
13 have gotten.

14 And so that is a -- that's a critically important
15 provision that -- and the first thing they did, as you've
16 seen, is an anticipatory repudiation of the agreement. But
17 based on their knowledge gained in a lengthy due diligence
18 period, including conversations with Timmons, they had all of
19 the requisite knowledge that is necessary for the intentional
20 torts which are specified in our complaint against them.

21 And so it is a -- it is -- you just -- there's no -- at
22 a minimum, there's a question of fact, but the fact is that
23 we asked for a -- we think we should be granted judgment as a
24 matter of law against them because the first thing they did
25 was to breach the lease and commit an anticipatory

1 repudiation. It was the final nail in Timmons's coffin.

2 And the other thing, Judge, is if you go back to the
3 summary judgment hearing that he's already lost, you will see
4 the litany of testimony and the fact that it destroyed the
5 life of Mike Timmons. He was not able to pay child support
6 for his child, who he has not seen with -- with anything like
7 the same regularity that he did before and he was not able to
8 pay child support. He was not able to -- he had to choose
9 which mouths to feed, even selling his grandmother's wedding
10 ring.

11 And so when Judge Seals heard that, he said I've heard
12 enough. Summary judgment denied.

13 THE COURT: All right.

14 MR. LE CLERCQ: And so --

15 THE COURT: I under -- I understand that now and I --

16 MR. OXNER: Your Honor, can I make one comment?

17 THE COURT: You can.

18 MR. OXNER: You know, we can get into all the emotions
19 of this case. I don't disagree that -- and I feel bad for
20 Mr. Timmons. Your Honor, I do 99 percent plaintiff's work.
21 So I certainly feel for Mr. Timmons that he spent that kind
22 of money.

23 The problem is he didn't do his due diligence and then
24 we've got in order. He could've been at the hearing. We got
25 an order from the judge saying that all liens, etc., etc.,

1 etc., are extinguished. It's unappealed. It's the law.
2 There's nothing we can do about it. We can bring up all
3 these leases and sections and code sections, etc., that we
4 want, but the law of the case is those liens and that lease
5 was extinguished.

6 THE COURT: Right.

7 MR. OXNER: It doesn't make a difference.

8 THE COURT: Right.

9 MR. OXNER: And all this testimony makes zero difference
10 because it doesn't make a difference. That lease doesn't
11 exist.

12 THE COURT: All right.

13 MR. LE CLERCQ: Not if it's with the Bank, Judge, and
14 Ms. Houghton has already admitted that. That if the lease is
15 with the Bank, that it can survive foreclosure. And Dale
16 Porter admitted that in the deposition.

17 THE COURT: All right.

18 MR. LE CLERCQ: That he could've entered a 30-year lease
19 in the post-foreclosure filing and pre-foreclosure sale
20 period that would have continued after. Mr. Saunders, for
21 what it's worth, also testified that the mortgage means what
22 it says that it means, as Mr. Porter did.

23 And so the fact is that simply because this *Lis Pendens*
24 is out here -- again, let me go back to the very important
25 duty that Blanton has to Timmons. Even if Timmons -- even if

1 he's not Timmons's agent --

2 THE COURT: We aren't even talking about Blanton's
3 liability here today.

4 MR. LE CLERCQ: I know, but the problem is --

5 MR. ANDERSON: Your Honor --

6 MR. LE CLERCQ: -- it's imputed. It is imputed to the
7 Bank because -- and you've seen that authority in our brief
8 that -- that his duties -- the Bank has got an obligation to
9 act commercially reasonably and so -- and that is imputed to
10 Blanton, but the fact is that Blanton has a duty under 40-57-
11 30(16) to disclose material adverse facts.

12 In particular, one that is custom-designed here because
13 that a party to a transaction is not able or does not intend
14 to meet an obligation under a contract or an agreement.
15 Blanton admitted that he knew that Atlantic was out of
16 business, out of here and moving out and, in fact, had
17 already started moving out before he ever got the lease
18 proposal from Timmons. The fact that he --

19 MR. ANDERSON: Your Honor? Your Honor?

20 MR. LE CLERCQ: -- didn't disclose it and he didn't do
21 it and we were damaged as a result, and that duty is -- he
22 was acting as the Bank's agent, as Blanton has admitted, and
23 so the Bank is also responsible for that clear and egregious
24 breach --

25 THE COURT: All right.

1 MR. LE CLERCQ: -- of the South Carolina Code.

2 THE COURT: Mr. Anderson?

3 MR. ANDERSON: Your Honor, if I may just briefly,
4 counsel keeps saying that Blanton knew about this, that they
5 were moving out, at the time that he entered into this lease
6 with Mr. Timmons. That's not the testimony.

7 He's shown the deposition testimony and the timeline of
8 when when he realized that is not on there. Blanton will
9 testify today or if you ask him about that time frame, it was
10 after he entered into this lease with Mr. Timmons. It was
11 after that fact.

12 At the time that he entered into the lease with Timmons,
13 he knew that foreclosure proceedings had begun, but he did
14 not know if -- he didn't have the crystal ball to know that
15 whoever purchased this property or it may be breachable or
16 couldn't continue with the property. He did not have any
17 knowledge at that time that Timmons would be out of this
18 property, and so that's very important.

19 The second thing I just wanted to briefly tell the Court
20 is Mr. Timmons at the time that he entered into this lease
21 was a customer. He was not a dual agent, as counsel has
22 alluded to in his brief that he submitted this week and he's
23 told the Court. Dual agency in South Carolina requires a
24 written confirmation. There was no written confirmation
25 whatsoever. He was simply a customer.

1 Mr. Blanton had responsibilities to his agent, which was
2 Atlantic Regional, when this -- when this lease was first
3 contemplated and subsequent when the Court made the
4 determination that he was going to be collecting the rents
5 for the Bank, he was the agent for the Bank at that time.

6 This that counsel has up on the screen, Section 27-35-
7 50, sale of real estate under lease, the lease was no longer.
8 It ended when the foreclosure took place and the lease was no
9 longer a lease at that time.

10 THE COURT: All right. Thank you, Mr. Anderson.

11 MR. LE CLERCQ: Judge, could I have just one point? And
12 that is this.

13 The -- the law in South Carolina is very clear about the
14 obligations of what they have to do, what a realtor has to do
15 and the duty to disclose material adverse facts, and this one
16 that is -- that is custom tailored for us, but the fact is
17 even if Blanton is not the agent of Timmons -- and we say
18 that he was, but if you look at Section 350, which is page
19 12, it could be 16 of 21, but if this 40-57-350 very clearly
20 is -- and we've cited this in our brief. They are obligated
21 to deal honestly with their customers and clients --

22 THE COURT: Right.

23 MR. LE CLERCQ: -- to disclose material adverse facts,
24 and they are also required in (g) -- in (g)(1), they have to
25 be truthful and in addition the -- it's section -- here it

1 is. Licensees are required to disclose to buyers and sellers
2 their role and duties that shall disclose material adverse
3 facts that affect the transaction or the value or condition
4 of the real property that are not readily ascertainable.

5 Let me draw the analogy. Let's talk about termites or
6 let's talk about electricity or when someone is buying a
7 house. Just the fact that you have hired a termite inspector
8 or an electrician to inspect the house, the realtor has got a
9 duty to disclose material adverse facts --

10 THE COURT: Okay. Well, that --

11 MR. LE CLERCQ: -- that could --

12 THE COURT: Once again, Blanton's responsibility is not
13 really before me at this juncture.

14 MR. LE CLERCQ: All right, Judge. Well, it's just that
15 we think that it's imputed to the Bank as the principal, but
16 I've said my piece and I thank you for the Court's indulgence
17 and allowing me to say my piece.

18 THE COURT: All right. Very good. Thank you.

19 MR. OXNER: Can I make one quick one?

20 THE COURT: Yes.

21 MR. OXNER: One thing I would encourage, Your Honor, is
22 that -- and I certainly don't know where you're going with
23 this, but if you so decide that WW Plasma is not entitled to
24 summary judgment, I think at a minimum you have to find
25 summary judgment as to the intentional torts and punitive

1 damages because there's been no evidence offered --

2 THE COURT: All right.

3 MR. OXNER: -- as to any intentional acts by my clients,
4 and that should at least be stricken.

5 THE COURT: Right.

6 MR. OXNER: Thank you.

7 THE COURT: All right. Mr. Oxner, what I'm going to ask
8 you to do -- I'm not ruling on anything at this juncture, but
9 I do want you to submit a proposed order granting the relief
10 you've requested and addressing the issue of the settlement,
11 the summary judgment with regard to the settlement.

12 MR. OXNER: Yes, sir.

13 THE COURT: I want that to be addressed and how this is
14 somewhat different than that and doesn't preclude me from
15 entertaining summary judgment with regard to the merits of
16 the case.

17 And, Ms. Houghton, I'm going to ask that you prepare a
18 -- an order granting summary judgment consistent with your
19 memorandum and your presentation here today.

20 And I am indeed going to be required to study this and
21 contemplate everything that y'all have presented to me. And
22 -- and I certainly do appreciate it.

23 MR. ANDERSON: Your Honor, would -- would we -- included
24 at the previous hearing, you had instructed the parties, the
25 plaintiff and The Blanton Company, to also provide an order

1 and you -- and your clerk asked that we hold off on that
2 until today.

3 THE COURT: I'll tell you what I'm going to do is I'm
4 going to review these orders that I've requested and it might
5 be that I am going to ask for each of your assistance once I
6 study.

7 I want to take a look at each of these causes of action.
8 I want to think about it and ponder and, as Judge Anderson
9 would say, cogitate on it a little bit. And if I need
10 additional proposed orders, I'll request them.

11 MR. OXNER: Thank you, Your Honor.

12 THE COURT: Thank y'all.

13 MR. LE CLERCQ: Thank you, Judge.

14 THE COURT: Thank you very much. Y'all have a good day.

15 (WHEREUPON, the proceedings ended at 12:57 p.m.)

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17 --- END REQUESTED TRANSCRIPT ---

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