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.

APPELLANT'S FINAL REPLY BRIEF

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Without restating the issues or making redundant arguments which have been thoroughly set forth in his opening brief, Appellant offers the following points of clarification and rebuttal to the arguments raised by Respondents. The single, most critical issue in this case is -- who is the lessor under Timmons' Lease—will the real lessor please stand up? Bank and Bank counsel have both admitted that the Bank had the *right* to lease the property to Timmons in the "post foreclosure filing/pre foreclosure sale period." The question here is – did they? Any "scintilla" of evidence that Bank was the lessor requires reversal, and there is much more than that here. The lower court ignores substantial record evidence that Bank was the lessor (e.g., Bank's instruction to Blanton immediately after service of the motion to enforce rents and other foreclosure papers on Blanton to "lease what you can and let's get the income coming until we decide to sell it or to continue to manage it"),[1] which requires reversal.

I. EVIDENCE IN THE RECORD SUPPORTS A FINDING THAT RESPONDENT FIRST RELIANCE BANK ENTERED INTO THE LEASE WITH APPELLANT TIMMONS AS THE LESSOR, MAKING THE LEASE ENFORCEABLE AGAINST RESPONDENT DESPITE THE FILING OF THE *LIS PENDENS* AND FORECLOSURE SALE.

1. The loan documents created by Respondents granted them all "right, title, and interest" (including the right to act as landlord and lessor) in the Sweetbriar property.

Respondents argue against the plain language of their own documents. Respondents argue that their loan documents do not have their open and obvious plain meaning, but rather that these documents only granted Respondent a security interest in the property. (Resp.'s Brf. at p. 21). However, the mortgage executed by Atlantic and recorded by Respondent (R. p. 0467; Mortgage, p. 1), indicating that third parties could and should rely on the same, obtains two separate clauses

[1] (R. p. 1136, ll. 2-24; Blanton Depo. (vol. 1) at p. 188, lns. 2-24)

both of which in plain, unambiguous language favor Appellant – – 1) a "Transfer of Title Clause" and 2) a "Transfer of Leases Clause." Both of them are described at page 1 of the Mortgage:

- Transfer of Title Clause: "[Atlantic] mortgages, grants and conveys to [First Reliance Bank] all of [Atlantic's] right, title, and interest in and to the following described real property . . . [Sweetbriar]."

- Transfer of Leases Clause: "[Atlantic] presently assigns to [First Reliance Bank] all of [Atlantic's] right, title, and interest in and to all present and future leases of the property [Sweetbriar] and all rents from the property [Sweetbriar].

(emphasis supplied).

This mortgage language is unambiguous, means what it says, and was recorded as a matter of public record. The lower court was required to enforce it according to its terms, *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994); *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993), but failed to do so. The Mortgage executed by Atlantic and recorded by Bank *also* stated:

- "Until the occurrence of an Event of Default, [Bank] may . . . (3) collect the Rents from the Property. (R. p. 0467, 4th par from bottom; p. 1, 4th par. from bottom)

- "**RIGHTS AND REMEDIES ON DEFAULT**. Upon the occurrence of an Event of Default and at any time thereafter, [Bank], at [Bank's] option, may exercise any one or more of the following rights and remedies . . . .

  Collect Rents. Lender shall have the right, without notice to [Atlantic], to take possession of the property and, as mortgagee – in – possession, collect the rents… . Lender may exercise its rights under this subparagraph either in person, by agent, or through a receiver." (R. p. 0471, par. 8; Ex. 3 of Plaintiff's Memo in Support of MSJ, Mortgage at p. 6/8, par. 8, emphasis in original).

The right to "collect rents" reasonably includes the right to enter new leases to collect new rents.

Additionally, Respondent was entitled to lease Sweetbriar pursuant to the November 27, 2014 Assignment of Rents, also a recorded document and matter of public record, with third parties having the right to rely on the same. Bank had a compelling financial interest to do so (much more than Atlantic), since *Respondent* would be getting the rents, *not* Atlantic, and long term tenants

would increase the appraised value of Sweetbriar making it easier to sell. The Assignment of Rents states:

> [Bank] shall have the right at any time, ***and even though no default shall have occurred under this Assignment, to collect and receive the Rents. For this purpose, Lender is hereby given and granted the following rights, powers, and authority***: . . . .
>
> Enter the Property. Lender may enter upon and take possession of the Property; demand, collect and receive from the tenants or from any other persons liable therefor, all of the Rents; institute and carry on all legal proceedings necessary for the protection of the Property, including such proceedings as may be necessary to recover possession of the Property; collect the Rents and remove any tenant or tenants or other persons from the Property.
> . . .
> **Lease the Property.** ***Lender may rent or lease the whole or any part of the Property for such term or terms and on such conditions as Lender may deem appropriate.***

(R. p. 1022; Assignment of Rents). (emphasis added). The Assignment of Rents further states that Respondent had the right to lease the property through an agent - like Property Manager Blanton. *Id*. R. p. 1024, par 1; at p. 4. par. 1:

> Employ Agents. Lender may engage such agent or agents as Lender may deem appropriate, either in Lender's name or in Grantor's name, ***to rent*** and manage the Property, including the collection and application of Rents. (emphasis added).

Bank had the right to lease the property directly or through an agent like Property Manager Blanton. *Id*. R. p. 1024, at par. 1; at p. 4. par. 1. But did they? The lower court ignores evidence that Bank was the Lessor, requiring reversal. Even counsel for Respondent confirms Bank's right to enter the Timmons Lease, and accurately described Bank's rights in this Assignment of Rents:

> This assignment makes clear – – I mean it grants the banks and fairly expansive rights under the terms of the assignment. . . . Under the terms of this document, the ***bank did have the right to enter into a lease with Mr. Timmons if they wanted***. . . . This is all, of course, to protect the bank's investment in – – in the property and the ***bank has the right to lease the property, if it so determines***."

(R. p. 1510, l. 18 – R. p. 1511, l. 12; Hr'g Tr. p. 33 line 18 – p. 34 line 12 (emphasis supplied).

Coupled with the evidence that Bank did authorize Blanton to enter the Timmons Lease, this critical admission is dispositive of the appeal. Bank and its counsel admit that Bank had the right to lease the property during the "post foreclosure filing/preforeclosure sale period." The lower court ignored substantial evidence confirming that Bank was the lessor, which requires reversal.

Even Bank executive Porter admitted Bank had the right to enter a "30 year lease" on Sweetbriar beginning August 1, 2015. (R. p. 1237, ll. 14-21; Porter Depo. at p. 129, lns. 14-21). Respondent's counsel confirmed the veracity of that statement at the hearing:

> The only way… that the plaintiff can… Avoid these clear legal bars of the *Lis Pendens* statute, of the fact that the foreclosure terminated the lease is if the plaintiff could show that the bank, in fact, entered into that lease, the bank was a party to that lease…

(R. p. 1526, ll. 20-25; Hr'g Tr. p. 49 line 20 – 25) (emphasis added).

Further**,** as discussed in greater detail below, not only did Respondent have the right to lease the property (as admitted by Bank and its counsel), ***it exercised that right*** when Dale Porter and Coit Yarborough instructed Blanton within several days of serving foreclosure documents on Blanton on July 23, 2015, and well prior to the execution by Blanton of the Timmons Lease, to "[l]ease what you can and, you know, let's get the income coming until we decide to sell it or to continue to manage it." (R. p. 1136, ll. 2-24; Blanton Depo. (vol. 1) at p. 188, lns. 2-24).

2. Respondents, as mortgagee on the Sweetbriar property, are bound by the encumbrances it made on the property, including Timmons' Lease.

The foreclosure sale did not extinguish the Lease that Respondent First Reliance Bank ("Bank" or "Respondent") was a party to and had knowledge of prior to the purchase. Respondents now argue in their brief that because Timmons executed his Lease after the filing of the *lis pendens,* it is not enforceable against Respondents. Respondents engage in "smoke and mirrors" with regard to this *lis pendens* argument, a lame attempt to distract the court's attention from the fact that it is

axiomatic that foreclosure only extinguishes the borrower in possessions' interest, and does not diminish a lender's rights in the property, but only augments them, including of course a lender's right (in this case, Respondent) to lease property. During the hearing on their Motion for Summary Judgment, counsel for Respondents admitted that Respondents had the right to lease the property during the "post-foreclosure filing/pre-foreclosure sale period" and that such a lease would survive the foreclosure sale. (R. p. 1510, ll. 18-25; R. p. 1511, ll. 1-12; Hr'g. Tr. at p. 33. ll. 18-25; p. 34. ll. 1-12). Respondent Dale Porter also confirmed during his deposition that as early as August 1, 2015, Respondent had the right under the Assignment of Rents to enter a long term lease on the property, like a "30 year lease". (R. p. 1237, ll. 14-21; Porter Depo. at p. 129, lns. 14-21). Counsel for Respondent confirmed the accuracy of this statement at the hearing on their Motion for Judgment (R. p. 1510, ll. 23-25; Hr.g' Tr. p. 33, ll. 23-25), and even confirmed that such a Lease survives foreclosure (R. p. 1526, ll. 21-25; Hr.g' Tr. p. 49, ll. 21-25). Significantly, the evidence below shows that not only did Respondents have the right to lease the property to Timmons, it did lease the property to him through Blanton acting as their agent.

On November 27, 2014, because of its payment history, Respondent forced Atlantic to sign an Assignment of Rents, which was filed at the RMC office as a matter of record. Respondent had the right to lease the property directly or through an agent like Property Manager Blanton, (R. p. 1024, par. 1; Assignment of Rents at p. 4, par. 1), and third parties had the right to rely on such publicly filed, recorded documents**.** Blanton testified that he had telephone conversations with Atlantic prior to the execution of Appellant's Lease, where Atlantic told Blanton "we are out of business." (R. p. 1104, l. 3 – R. p. 1105, l. 21; Blanton Dep. (vol. 1) at p. 96, line 3—p. 97 line 21). Blanton also testified that he had an obligation when foreclosure was filed to make contact with the borrower in possession, Atlantic, to find out their intentions, then testified that Atlantic

was "out of business" and, as to Sweetbriar, was "out of here," which Blanton interpreted to mean that Atlantic was not going to try to bring that mortgage current, but rather, that title to Sweetbriar would be lost in the foreclosure to Bank:

> Q: Do you think that you have an obligation to go to [Atlantic] just to find out whether they are going to either bring the property current or whether they're going to let it go to the bank? Because you have to rent the property.
>
> A: . . . Yeah. Sure. "What are you guys going to do? Are you moving out of here? Are you just going to sit until they [Bank] basically throw you out?" I don't know.
>
> Q: Did you actually do that in this case? Did you go to Atlantic any time after July 24 and have a conversation with them to find out what their intentions were [regarding] the foreclosure?
>
> A: I'm sure that we had phone conversations… With them saying, "yeah, you know, we are out of business," or "we're gone."

(R. p. 1104, l. 3 – R. p. 1105, l. 21; Blanton Dep. (vol. 1) at p. 96, line 3—p. 97 line 21); see also (R. pp. 1107-1110; (vol. 1) pp. 100-103.

Critically, Blanton understood that because Atlantic was "out of business," it was Respondents that would be leasing the property to tenants like Timmons, not Atlantic:

> Q: [G]ive me a range of time that you think those conversations [with Cooke] took place. Was it on July 24 [date of service upon Blanton] itself? Was it a week later? Was it a month? You know when do you think it was?
>
> A: There's no way I can answer that except to guess. You know, it certainly wasn't on the day that I was presented with the fact that there was a foreclosure action. I guess [Richard Cook] called me or I called him and said, "hey, you know, let me know what you're doing, when you're getting out of here, so I can talk with the bank and see if they subsequently want to lease – – you know, to lease the space."

(R. p. 1109, l. 21 – R. p. 1110, l. 10; Blanton Dep. (vol. 1) at p. 102 line 21 – p. 103 line 10) (emphasis supplied**).** Blanton did in fact speak with Bank and Bank's attorney about Timmons' 18 year Lease prior to August 20, 2015 (the date of the Lease), both of whom instructed Blanton to lease the space. In fact within several days of the foreclosure papers being served upon Blanton

on July 24, 2015, almost a month *before* the Timmons Lease, Bank Defendant Dale Porter, Bank Attorney Coit Yarborough had an in person meeting with Blanton at Yarborough's office. Blanton, who knew at that meeting that Atlantic was "out of business" and could not honor any long term leases, testified in his deposition that he was told by Dale Porter at Bank during this critical meeting to "[l]ease what you can and, you know, let's get the income coming until we decide to sell it or to continue to manage it." (R. p. 1136, ll. 2-24; Blanton Depo. (vol. 1) at p. 188, lns. 2-24).

During his deposition, Blanton was adamant that the Bank was the lessor:

> Q: So we've got this lease that is signed between Mr. Timmons and you, as lessor, for what I would call a long term lease . . . on August 20 of 2015. Would you agree with me that you would not have let [Timmons] sign that lease knowing that the property was in foreclosure proceedings unless you had also told the bank about the proposed lease?
>
> Ms. Houghton: Object to form.
>
> A: There is no way in this world – – and I'll give my [real estate] license up tomorrow, and Mike [Timmons] knows this. There's no way that I would've ever facilitated a lease with someone who's willing to spend their money, put their heart into it, and my heart into it, being a reputable broker has been here 41 years, and I would never, ever do that. And if I did, then just take my damn license away from me. I would not do that.

(R. p. 1120, l. 25 – R. p. 1121, l. 25; Blanton Dep. (vol. 1) at p. 125 line 25 – p. 126 line 25). (emphasis supplied).

From July 24, 2015 through January 27, 2017, Blanton served as property manager and agent for Bank, collected rents from Sweetbriar tenants, deducted property management expenses and other expenses, and forwarded rent revenues to Bank. (R. p. 1141, ll. 20-25; R. p. 1142, ll. 1-10; R. p. 1122, ll. 16-21; Blanton Depo. (vol. 1) at p. 226, lns. 20-25 and p. 227, lns. 1-10; p. 138 line 16-21). Blanton admitted in his discovery responses that he had a ***contract*** with Bank, was property manager for Bank, and that Bank paid him for his services with regard to the same**.** (R.

pp. 0236-0237; R. pp. 0227-0228; Blanton RTA Nos. 17, 5). In his deposition Blanton admitted that he acted as agent for the bank ***on and after*** July 24, 2015. (R. p. 1100, l. 10 – R. p. 1102, l. 4; R. p. 1101, ll. 15-22; Blanton Depo. (vol. 1) at p. 69 line 10 – p. 71, line 4; n.b. p. 70 lns. 15-22—"subsequent" – in other words, beginning on July 24—"**).**

Critically, Respondents' brief ignores the evidence that Respondents authorized Blanton to enter leases on the property, including Appellant's lease, and they claim that they had no knowledge of Timmons' Lease prior to the date of the foreclosure sale. (Resp.'s Brief at p. 16, fn. 2). However, from August 1 – 17, 2015, Blanton -- aware that Sweetbriar was in foreclosure, out of business, "out of here [Sweetbriar]", and would let [Sweetbriar] go to Bank, with specific authorization from Bank Executive Porter to "***lease what you can and lets get the income coming in***" at Sweetbriar, and aware that Bank had moved to have him appointed as agent and property manager for Bank per the Assignment of Rents described in if not attached to papers served on Blanton on 7/24/15) was in contact with Timmons and told him that the property was available at Sweetbriar. Blanton met with Timmons, showed him the site, and Timmons was interested. (R. p. 1114, l. 6 – R. p. 1115, l. 4; R. p. 1070, l. 12 – R. p. 1071, l. 11; Blanton Dep. (vol. 1) at pp. 112 line 6 - p. 113 line 4; Timmons Dep. (vol. 2) at p. 54 line 12 – p. 55 line 11). Timmons told Blanton the property was a "total gut job" and "total redo" and that he would have to invest substantial sums to renovate it, and thus needed a long term Lease to justify the investment. (R. p. 1071, ll. 7-23; Timmons Depo. (vol. 2) at p. 55, lns. 7-23). After Timmons sent Blanton a proposal at Blanton's request, Blanton sent the proposal to Bank attorney Coit Yarborough. (R. p. 1119, ll. 1-9; R. p. 0564; Blanton Depo. (vol. 1) at p. 123, lns. 1-9; App. Memo in Supp. SMJ, Ex. 24 - Blanton notes with Timmons Proposal).

Blanton testified that he "***obviously***" spoke with Bank attorney Yarborough about

Timmons' lease ***prior*** to it being signed on August 20, 2015 as indicated by his notes. (R. p. 1120, ll 24-25; R. p. 1121, ll. 1-19; R. p. 1130, l. 23; R. p. 1132, ll. 4-7; R. p. 1133, ll. 3-9; Blanton Dep. (vol. 1) at p. 125, lns. 24-25 and p. 126, lns. 1-19; p. 178, line 23; p. 180 lns. 4-7; n.b. p. 181 lns. 3-9): *"Q. Tell me what it means: the "Ray Coit Yarborough, the telephone number… A. It's all my handwriting. Obviously [I] spoke with Ray [Coit Yarborough]***").** This is evidence that, on or about August 17, 2015, three days prior to the execution of the Timmons Lease, and *in addition* to his in person meeting with Bank executive Porter and Bank Counsel Yarborough, Blanton also had at least one separate conversation with Yarborough about the Timmons lease. Bank and its counsel specifically authorized and engaged property manager Blanton to enter the Timmons Lease on Bank's behalf.

Further, Blanton admitted that "subsequent to July 24, 2015, he was acting as property manager for First Reliance Bank with regard to Sweetbriar, including for the property leased by Timmons." (R. pp. 0227-0228; Blanton RTA No. 5). Blanton confirmed the same in his deposition. (R. p. 1128, l. 24 – R. p. 1129, l. 25; Blanton Dep. (vol. 1) at p. 172, line 24 to p. 173, line 25). Blanton also confirmed in his deposition that principals for whom he works as property manager are bound to comply with the leases he enters on their behalf. (R. p. 1094, ll. 18-22; Blanton Dep. (vol. 1) at p. 21, lns. 18-22).

In their Brief, Respondents cite *Pipkin v. Fletcher*, 165 S.C. 98, 162 S.E. 774, 777 (1932), *Savannah Timber Co. v. Deer*, 258 F. 777, 783 (D.S.C. 1918), and *McNair v. Alex*, 105 S.C. 445, 90 S.E. 23 (1916) (Resp.'s Brief at pp. 13-15) for the proposition that where a person who acquires an interest in property subject to a *lis pendens* in a foreclosure action, that interest is subject to the foreclosure. However, these cases are easily distinguishable from the present matter because, unlike here, the lessees in those cases acquired their interests in the properties from the ***mortgagor***

as opposed to the ***mortgagee***. In each of those cases, the mortgager being foreclosed on leased the property after the filing of a *lis pendens* by the mortgagee. Contrary to the argument made in Respondents' brief, Respondents did not simply have knowledge of Timmons' lease, they were a party to it. (Resp.'s Brief at pp. 16-17). Here, after they filed the *lis pendens,* Respondents themselves encumbered the property when they entered into a long-term lease with Timmons. Respondents have cited no authority to support their claim that a lease is unenforceable against a mortgagee who encumbers a property with a long term lease after it files a *lis pendens*. Respondents admit that such a lease would be valid.

3. Because Respondents were a party to the Timmons Lease, the unrecorded lease was not extinguished following the sale of the property at public foreclosure auction.

Respondents argue in their brief that because Timmons' Lease was not recorded, it was extinguished by the foreclosure judgment sale. (Resp.'s Brf. at p. 19). They cite Section 27-33-30 of the South Carolina Code which provides: "[i]n order to give notice to third persons any lease or agreement for the use or occupancy of real estate shall be recorded in the same manner as a deed of real estate." However, on its face, the purpose of this recording statute is to provide notice to third parties who do not have notice of the lease and actual notice is a defense to the lack of recording. *See In re Dunes Hotel Associates*, 194 B.R. 967, 980-981 (Bankr. D.S.C. 1995) (citing *Friarsgate, Inc. v. First Federal Savings and Loan,* 454 S.E.2d 901 (S.C.App.1995)).

Here, Respondent instructed Blanton to lease the property and Blanton consulted with Respondent prior to leasing the property to Appellant. Respondent of course had a vested financial interest in entering the long-term Lease, since Respondent would be getting (and did in fact get) all rents. The right to "collect the rents" includes not just the right to collect existing rents, but to rent the property to bring in *new* rents. (R. pp. 1021-1026; Assignment of Rents). Blanton also

provided a copy of the rent rolls to Respondent with all of the leases at the property, including Appellant's lease. (R. p. 1119, ll. 1-17; R. pp. 1120-1121; R. p. 1136, ll. 9-21; Blanton Depo. (vol. 1) at p. 123, lns. 1-17; pp. 125-126; p. 188, lns. 9-21; R. p. 1238, ll. 1-13; R. pp. 1247-1248; Porter Depo. at p. 139, lns. 1-13; pp. 167-168). Respondent employee Porter testified that he had this document *prior to* the execution of Appellant's Lease on August 20, 2015, and thus Porter had full knowledge of Appellant's lease at the time of the foreclosure sale. *Id.*

As noted above, there exists evidence in the record that Respondents not only had notice of Timmons' Lease, but they were parties to it as well. Thus, whether or not the lease was recorded is immaterial as it relates to Respondents and is enforceable against Respondents.

II. EVIDENCE IN THE RECORD SUPPORTS A FINDING THAT RESPONDENTS ADOPTED AND RATIFIED THE TIMMONS LEASE.

In their brief, Respondents argue that summary judgment on the issue of ratification was appropriate because Timmons could not establish any evidence to support the required element of Respondents' intention to adopt the Lease. Respondents argue that it is irrelevant that Timmons did not learn of First Reliance's intention to extinguish the leases until sometime after Blanton forwarded him the First Reliance's letter on February 26, 2016. (Resp.'s Brf. at pp. 46-47). Under South Carolina law, "[r]atification, as it relates to the law of agency, means the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent." *Lincoln v. Aetna Cas. & Sur. Co.*, 300 S.C. 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989). "Ratification proceeds upon the assumption that there has been no prior authority." 2A C.J.S. Agency § 52 (2013). "However, once a ratification has occurred, it is equivalent to original, prior, or previous authority." *Id.* In *Lincoln*, the South Carolina Court of Appeals first stated the three elements of ratification, "(1) acceptance by the principal of the benefits of the agent's acts, (2) full knowledge of the facts, and (3)

circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangements." 300 S.C. at 191, 386 S.E.2d at 803; *see Stiltner v. USAA Cas. Ins. Co.*, 395 S.C. 183, 191, 717 S.E.2d 74, 78 (Ct. App. 2011).

Even when considering the acts and conduct of First Reliance as Respondents' Brief demands, evidence in the record supports a finding that First Reliance had the intent to adopt Timmons' Lease. On December 3, 2015, Bank got Judgment of Foreclosure. (R. pp. 0678-0685; Judgment of Foreclosure and Sale). By January 2, 2016, there had been no appeal by Atlantic of Judgment of Foreclosure, the order was final and the property was subject to foreclosure sale. On January 4, 2016, Timmons paid January rent to Blanton, by check #2074, later sent to and accepted by Bank in late January 2016. (R. p. 0663; Timmons Checks). Bank thus accepted rent payment under Timmons' 18 year Lease *after* having final judgment of foreclosure and prior to expressing an intent not to continue Timmons' Lease through its February 8, 2016 letter to Blanton. (R. p. 0697; Bank Letter to Blanton). Contrary to Respondents' claim, this is evidence that First Reliance intended to adopt Timmons' Lease.

Additionally, the foreclosure sale of Sweetbriar took place on February 4, 2016. Bank extinguished Atlantic's interest in Sweetbriar, and was the "high bidder" at the sale. Critically, Bank accepted Timmons' February 2016 rent payment, which was received and deposited by its agent, Blanton on February 4, 2016. (R. p. 0663; Timmons' Rent Check #2129). Again, this was prior to Bank expressing an intent not to continue Timmons' Lease through its February 8, 2016 letter to Blanton.

At a minimum, the October 2, 2015 Order on Payment of Rents establishes that Blanton was agent for First Reliance for at least the purpose of collecting and paying it rents from the

Sweetbriar property per First Reliance's request in its Motion to Enforce Assignment of Rents. (R. pp. 1027-1030; Mot. to Enforce Rents; R. pp. 1052-1053; Order on Payment of Rents).

"Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Kirkland Dale Smith, Janel Elizabeth Smith, Euro Mortg. Bankers, Inc.*, 406 S.C. 37, 748 S.E.2d 625 (S.C. App. 2013)(quoting Restatement (Third) of Agency § 1.01 (2006)). An agent is one appointed by a principal as his representative and to whom the principal confides the management of some business to be transacted in the principal's name, or on his account, and who brings about or effects legal relationships between the principal and third parties." *Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County*, 371 S.C. 224, 239, 638 S.E.2d 685, 693 (2006). **A property manager collecting rents is an agent for the principal. *F&D Electrical Contractors, Inc. v. Powder Coaters, Inc.*, 350 S.C. 454, 567 S.E.2d 842 (S.C. 2002).**

Here, Respondents' July 23, 2015 motion to enforce rents against Atlantic pursuant to its November 27, 2014 Assignment of Rents specifically identifies Blanton as an "agent" and requests the court to make Blanton ***its*** agent to collect rents and manage the Sweetbriar property which the court agreed to do per its October 2, 2015 Payment of Rents Order. (R. pp. 1027-1030; Mot. to Enforce Rents; R. pp. 1052-1053; Order on Payment of Rents). Accordingly, the acceptance and deposit of Timmons' February 2016 rent payment on February 4, 2016 by Blanton is imputed to First Reliance and evidence of its intention to adopt the Timmons' Lease. First Reliance manifested its intent to honor Timmons' lease when it accepted his January and February rent payments following the December 3, 2015 grant of foreclosure and the February 4, 2016 foreclosure sale.

III. TIMMONS PRESERVED, AND DID NOT ABANDON, THE ARGUMENT THAT FIRST RELIANCE FAILED TO ACT IN A "COMMERCIALLY REASONABLE" MANNER PURSUANT TO SECTION 29-3-100.

Respondents incorrectly allege that Appellant failed to preserve and/or abandoned this argument on appeal claiming that Timmons is asserting a cause of action pursuant to this statute for the first time on appeal. (Resp.'s Brf. at pp. 39-41). This claim has no merit because Appellant's brief in support of summary judgment specifically argues that Respondents are liable for Timmons' damages because Bank and its agent Blanton did not proceed in a "commercially reasonable manner" under S.C. Code Ann. § 29-3-100(C). (R. pp. 0408-0412; App.'s Memo in Supp. of Sum Jud. at pp. 46-50). Bank alleges that Appellant failed to support such argument, and thus abandoned it, but Appellant (in addition to the compelling statutory authority) cited multiple cases for the proposition that Timmons has a cause of action for Bank's failure to proceed in a commercially reasonable manner. (R. pp. 0408-0412; App.'s Memo in Supp. of Sum Jud. at pp. 46-50) **(**citing *Mid-Continent Refrigerator Co. v. Carpenter*, 287 S.C. 624, 340 S.E.2d 559 (S.C. App. 1985, and *Associates Commercial Corporation v. Hammond*, 285 S.C. 277, 330 S.E.2d 82 (S.C.App.1985). Appellant specifically argued that "Bank's duty to act in a commercially reasonable manner required Bank, at a minimum, to inform Timmons that it did not intend to honor, or was uncertain to honor, the long term lease." *Id.* at R. p. 0412; p. 50. Respondents further argue that the district court did not rule on this issue, however, the court's grant of summary judgment on all claims brought by Timmons against First Reliance necessarily includes Timmons' claim under this statute.

IV. APPELLANT ASSERTED ERRORS WITH RESPECT TO THE CIRCUIT COURT'S RULINGS AND GRANT OF SUMMARY JUDGMENT AS TO ALL CLAIMS BROUGHT BY APPELLANT AGAINST RESPONDENTS INCLUDING CLAIMS FOR VIOLATION OF THE UNFAIR TRADE PRACTICES ACT (COUNT IX), TORTIOUS INTERFERENCE WITH CONTRACT (COUNT XI), TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS

OPPORTUNITIES (COUNT XII), BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING (COUNT XIII), AND NEGLIGENT SUPERVISION (COUNT XIV).

Respondents allege in their Brief that Appellant does not assert errors with respect to the circuit court's rulings and grant of summary judgment as to these claims. (Resp.'s Brf. at p. 10). However, Appellant asserted errors with respect to these rulings in its July 23, 2020 Notice of Appeal which states that Timmons "appeals the June 23, 2020 Order Granting Defendants First Reliance Bank, Inc., Dale Porter and F.R. Saunders, Jr.'s Motion for Summary Judgment *as to All Claims Asserted by Plaintiff* . . .." (Notice of Appeal) (emphasis added). These claims "live or die" based on the same arguments made in the balance of Appellant's initial brief, and particularly, the identity of the lessor, and the agency arguments that Blanton was the agent of Bank. If, as Appellant submits, there is credible record evidence the Bank was the lessor of Timmons' lease, and that (as Blanton admits) Blanton was the agent of Bank, then these other counts also survive. Appellant's proper appeal of the "commercially unreasonable" actions of Bank discussed in the prior section is a predicate for and incorporates unfair trade practices liability.

CONCLUSION

Based on Appellant's original brief and the reasons stated above, Appellant respectfully requests that this Court reverse the trial court's decision to grant Respondents' Motion for Summary Judgment.

April 23, 2021

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The undersigned hereby certifies that this *Final Reply Brief of Appellant* complies with Rule 211(b), SCRAP.

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