



Anderson Common Pleas

**Case Caption:** Residential Capital Partners Secured Loan Fund VIII Llc VS Sine Qua  
Non Properties Llc , defendant, et al  
**Case Number:** 2020CP0402390  
**Type:** Master/Order/Notice of Foreclosure Sale

So Ordered

Steven C. Kirven, Master in Equity

Electronically signed on 2021-04-28 12:28:49 page 2 of 2

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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
 In The Court of Appeals  
 APPEAL FROM ANDERSON COUNTY  
 Court of Common Pleas  
 Judge Steven C. Kirven, Master In Equity  
 Case No. 2020-CP-0402390

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 SC Court of Appeals

Residential Capital Partners  
 Secured Loan Fund VIII, LLC, Respondent,  
 v.

Sine Qua Non Properties LLC, and  
 Scott M. Smith  
 Appellants

**BRIEF OF APPELLANT**

—————  
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**STATUTES**

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## STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FAILING TO FIND A MATERIAL ISSUE OF FACT WHEN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF?
2. DID THE TRIAL COURT ERR IN FAILING TO HEAR THE COUNTERCLAIMS FILED BY DEFENDANTS?
3. DID THE TRIAL COUR ERR IN FAILING TO HEAR THE DEFENDANTS' CLAIMS FOR FRAUD UNDER RULE 60 (b) (3)?

## STATEMENT OF THE CASE

On December 3, 2020, Residential Capital Partners Secured Loan Fund VIII, LLC (the "Plaintiff") brought this foreclosure action against Sine Qua Non Properties LLC (the "Company"), and Scott Smith, individually (Company and Scott Smith are hereinafter collectively "Defendants") (Plaintiff and Defendants are hereinafter the "Parties") for breach of contract. Defendants answered Plaintiff's complaint alleging the defense that Plaintiff failed to provide adequate notice to Defendants which was a condition precedent to filing for a default under the loan documents. Defendants also filed counterclaims for breach of contract and intentional infliction of emotional distress. Plaintiff's motion for summary judgment action was heard on or around April 15, 2021, and judgment was entered on April 24, 2021, granting Plaintiff's motion for summary judgment and not even hearing Defendants' counterclaims. On May 18, 2021, Defendants served the Notice of Appeal on Plaintiff.

## STANDARD OF REVIEW

The standard of review for appeals for foreclosure actions is an abuse of discretion. *Hillman v. Pinion*, 347 S.C. 253, 255-56, 554 S.E.2d 427, 429 (Ct. App. 2001). An abuse of discretion occurs when the master's order is controlled by an error of law or is without evidentiary support. *Id.*

## FACTS

The Parties have done business before when Defendants' residence was in Houston, Texas. On March 3, 2020, the Parties engaged in another real estate transaction wherein Plaintiff loaned Defendants the money to purchase and renovate the property located at 500 Whitehall Road, Anderson, SC, 29625 (hereinafter the "Property"). The note executed by the Parties was for a term of 270 days. During the year of 2020, in addition to the complications and delays brought on by COVID, Defendants performed the construction required to make the Property marketable and made all payments as required by the loan. Throughout that time, Plaintiff and Defendants had issues with draws as inspectors were not inspecting properties as usually done prior to COVID. Accordingly, issues ensued with draws when work was done which would affect payments. Nevertheless, Defendant paid all required payments. As anticipated given the market during COVID, however, while the Property was up for sale, no one purchased it within the 270 days.

As customary in the "hard money" industry, and in prior practices with Plaintiff, if a loan expires by its terms, Plaintiff would normally charge a 1 point fee to extend the loan for three (3) months. Without hearing anything to the contrary, Defendants assumed this occurred. However, during the week of Christmas 2020, Defendants were made aware of a notice on the door at the Property. Accordingly, Defendants called the number on the notice and were told that there was a lawsuit filed and needed to

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be served. Without notice of what it was, Defendants immediately met with a process server to be served with the foreclosure action.

Immediately, Defendants contacted Plaintiff's counsel to determine the issue. Defendants were advised that they were sent notice of a default (as required by page 9, Section 16 of the Mortgage and Security Agreement (the Mortgage and Security Agreement is attached hereto as Exhibit A and hereinafter the "Loan Documents")) to Defendants' former address of 12626 Westmere Drive, Houston, Texas, 77077 (Defendants moved from there to Alpharetta, GA on or around November 15, 2018). Additionally, Defendants were required to submit an application for this loan which required Defendants to provide a current address wherein Defendants' Georgia address was provided, and the closing settlement statement (which the Parties signed) had Defendants' current address (see Exhibit B attached hereto). Lastly, the Company's registered agent was not served nor was the Company served at the Georgia address despite it being updated upon moving to Georgia from Houston, Texas and is a matter of public record. Accordingly, Defendants never received the notice from Plaintiff of demand to cure the default-a condition precedent to filing a foreclosure action-and were therefore unable to cure as allowed under the Loan Documents.

Additionally, after Defendants were served, Defendants contacted Plaintiff's attorney who agreed that Plaintiff would extend the term of the loan for a one (1) percent extension fee as customary in the industry and with the Parties' prior dealings. However, despite the Defendants good-faith effort to resolve the issue, the Plaintiff sent the wire for the one percent extension and current payments back once received explaining that it wasn't payment in full and was not accepted (see Exhibit C attached hereto). Accordingly not only did Plaintiff continue with the foreclosure action but also raised the interest rate from December to now from 11% to 18%. As a result, the loan amount of \$90,000 is now approximately \$110,000 from attorney's fees and inflated interest.

ARGUMENTS

I. THE TRIAL COURT ERRED IN FAILING TO FIND A MATERIAL ISSUE OF FACT WHEN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF.

Summary judgment is appropriate where there are no genuine issues of material fact or law. See SCRCP 56. In this case, Defendants filed a timely answer and alleged that there was a material issue of fact insofar as Plaintiff failed to send effective and proper notice to Defendants as required by the Loan Documents. The trial court chose to simply overlook this issue and not accept any evidence to support Defendants' claim. Accordingly, the trial court abused its discretion by not hearing or allowing any evidence or entertaining Defendants' arguments.

II. THE TRIAL COURT ERRED IN FAILING TO HEAR THE COUNTERCLAIMS FILED BY DEFENDANTS.

The trial court also erred when it failed address Defendants' counterclaim. In addition to not hearing evidence regarding the notice issue, *supra*, which is a condition precedent to the foreclosure action, the trial court failed to allow Defendants' counterclaims to be heard. Under South Carolina Rules of Civil Procedure Rule 12 (b), "[e]very defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required." In this case, Defendants filed two counterclaims with the trial court in its initial answer and then amended the same. When asked, the lower court simply stated that because it granted Plaintiff's

motion for summary judgment on the foreclosure, the counterclaims simply disappear. Additionally, it didn't bother to address the same in the order. Accordingly, the trial court erred when not entertaining the counterclaims asserted by Defendants.

III. DEFENDANTS HEREBY SEEK RELIEF FROM JUDGMENT UNDER RULE 60 (b) (3).

Defendants hereby seek relief from the trial court's judgment. Defendants are entitled to relief from judgment under Rule 60(b)(3) as the Plaintiff misrepresented to the trial court that they provided accurate notice to the Defendants after it was brought to their attention that it was not. "In determining whether to grant a motion under Rule 60(b), the trial judge should consider: (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other party." *Micronics, Inc. v. South Carolina Dep't of Revenue*, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct. App. 2001). Regarding a mortgage foreclosure action, "In an appeal from an action in equity, tried by a judge alone, we may find facts in accordance with our own view of the preponderance of the evidence."; *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009) (citing *Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct. App. 2008)).

In this case, Defendants brought the mistake or issue of a lack of proper notice to Plaintiff upon receipt of service of the case. On the Loan Documents, Plaintiff, who drafted the documents, negligently used Defendants' Houston address. Despite Defendants' making Plaintiff's attorney aware of this, Plaintiff's attorney represented to the trial judge that they served adequate notice of Defendants as required by the Loan Documents. Additionally, Defendants paid the customary one point fee to extend the loan as agreed; however, Plaintiff continued to prosecute the foreclosure. Moreover, in Plaintiff's complaint, they alleged two counts for the foreclosure: (1) that someone lived in the house in violation of the Loan Documents; and (2) the loan was due and payable; however, no one has ever lived in the Property, and Plaintiff failed to provide any evidence to support that claim. Lastly, Plaintiff also stated in their action for foreclosure that Defendant had sixty (60 days) to answer the claim (see Exhibit D attached hereto); however, the rules of South Carolina allow for only thirty (30) days to respond. See SCRPC Rule 12(a). Then, in Plaintiff's motion for summary judgment, Plaintiff asserted a motion for default as Defendant failed to answer in a timely manner (see Exhibit E attached hereto). Accordingly, Plaintiff has intentionally misrepresented the facts of the case and led the trial court to believe that they executed the foreclosure as required by the letter of the law and pursuant to the contract they drafted incorrectly and to which they are bound. They did not. It follows that Defendants are entitled to, and this Court should issue to Defendants, relief under Rule 60(b)(3).

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

May 18, 2021

/s/ Scott M. Smith

Scott M. Smith  
PO Box 681574  
Franklin, TN 37068  
(630) 640-8506  
Appellant

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**SC Court of Appeals**

Cc: William Koehler  
1201 Main Street, Suite 1450  
Columbia, SC 29201  
803-828-0880  
Attorney for Respondent

**EXHIBIT A**

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**14. Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument in accordance with Applicable Law. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Further, if the Property is single family and is subsequently subdivided into a duplex or other multi-residential type property, Borrower agrees that upon any approved subdivision sale or disposition of a part of the Property, all proceeds realized from the subdivision sale or disposition shall be applied to the payment of amounts due under the Note, in the inverse order of maturity.

**15. Hazardous Substances.** As used in this Section: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and of the jurisdiction there the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

**16. Acceleration; Remedies.** Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under the applicable Section hereof unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the nonexistence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this

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**EXHIBIT B**

<p><b>A. SETTLEMENT STATEMENT</b></p> <p style="text-align: center;"><b>Wendell Hawkins, P.A.</b>                  116 East Earle Street                  Anderson, South Carolina 29621                  (864) 332-0881 fax: (864) 332-0882</p>	<p><b>B. TYPE OF LOAN</b></p> <p>1. <input type="checkbox"/> FIA 2. <input type="checkbox"/> FMHA 3. <input checked="" type="checkbox"/> CONV. UNINS.                  4. <input type="checkbox"/> VA 5. <input type="checkbox"/> CONV. INS.</p> <p>6. File Number: <b>W03780</b> 7. Loan Number:                  8. Mortgage Ins. Case No:</p>
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*C. NOTE: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked (poc) were paid outside the closing. They are shown here for informational purposes and are not included in the totals.*

**D. Borrower:** Sine Qua Non Properties, LLC  
 PO Box 767891  
 Roswell, Georgia 30076

**E. Seller:** JAMCM, LLC  
 243 Ermon Court  
 Greer, South Carolina 29651  
 Residential Capital Partners Secured Loan Fund VIII, LLC

**F. Lender:** 3838 Oak Lawn Avenue  
 Suite 1500  
 Dallas, Texas 75219  
 500 Whitehall Rd

**G. Property:** Anderson, Anderson County, South Carolina 29621  
 Centerville  
 Township Centerville, Lot 27, Book 91, Page 131, Anderson County, South Carolina

**H. Settlement Agent:** Wendell Hawkins, P.A.  
 Place of Settlement: 116 East Earle Street, Anderson, South Carolina 29621 Anderson County

**I. Settlement Date:** March 3, 2020

J. Summary of Borrower's Transaction	K. Summary of Seller's Transaction
<b>100. Gross Amount Due From Borrower:</b>	<b>400. Gross Amount Due To Seller:</b>
101. Contract Sales Price 70,000.00	401. Contract Sales Price 70,000.00
102. Personal Property	402. Personal Property
103. Settlement Charges to Borrower (line 1400) 3,207.70	403.
104. Loan amount available for future draws 16,600.00	404.
<b>Adjustments for Items Paid by Seller in Advance:</b>	<b>Adjustments for Items Paid by Seller in Advance:</b>
106. City / Town Taxes	406. City / Town Taxes
107. County / Parish Taxes	407. County / Parish Taxes
108. Assessments	408. Assessments
<b>120. Gross Amount Due from Borrower: 89,807.70</b>	<b>420. Gross Amount Due to Seller: 70,000.00</b>
<b>200. Amounts Paid by or in Behalf of Borrower:</b>	<b>500. Reductions in Amount Due to Seller:</b>
201. Deposit / Earnest Money 1,000.00	501. Excess Deposit (see instructions)
202. Principal Amount of New Loan 86,600.00	502. Settlement Charges to Seller (Line 1400) 4,849.00
203. Existing Loan(s)	503. Existing Loan(s)
204. Seller paid closing costs 2,837.81	504. Payoff of First Mortgage
205.	505. Payoff of Second Mortgage
206.	506. Purchase Money Mortgage
207.	507. Seller paid closing costs 2,837.81
<b>Adjustments for Items Unpaid by Seller:</b>	<b>Adjustments for Items Unpaid by Seller:</b>
210. City / Town Taxes	510. City / Town Taxes
211. County / Parish Taxes Jan 1, 2020 thru Mar 2, 2020 369.89	511. County / Parish Taxes Jan 1, 2020 thru Mar 2, 2020 369.89
212. Assessments	512. Assessments
<b>220. Total Paid by / for Borrower: 90,807.70</b>	<b>520. Total Reductions in Amount Due Seller: 8,056.70</b>
<b>300. Cash at Settlement from / to Borrower:</b>	<b>600. Cash at Settlement to / from Seller:</b>
301. Gross Amount due from Borrower (line 120) 89,807.70	601. Gross Amount due to Seller (line 420) 70,000.00
302. Less Amount Paid by/for Borrower (line 220) 90,807.70	602. Less Reductions Amount due Seller (line 520) 8,056.70
<b>303. Cash To Borrower: \$1,000.00</b>	<b>603. Cash To Seller: \$61,943.30</b>

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**EXHIBIT C**

Residential Capital Partners  
PO BOX 17368  
Austin, Texas 78760-7368



March 1, 2021

Via Fedex: 7730 2819 4552

SINEQUA NON PROPERTIES, LLC  
7001 Beaver Creek Road  
Alpharetta, Georgia 30022

Subject: 2020-02-3021-SC, 500 Whitehall Road

SINEQUA NON PROPERTIES, LLC,

We recently received a payment on this loan in the amount of \$3500. This amount is insufficient to cure default or pay off your loan. The debt on your loan has been accelerated and partial payment will not be accepted. Your payment has been rejected and will be refunded in the form it was received. Please allow several days from the date of this letter for funds to clear.

This does not constitute a waiver of default or indemnity on this loan. To cure your payment default, you must make a payment by wire or certified check in full Payoff of the loan.

Please contact us at (866)441-0223 to request a Payoff Quote. If the loan is subject to active foreclosure, you may also contact the foreclosure firm to request a Payoff Quote.

Sincerely,

Residential Capital Partners, LLC

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To the extent your obligations have been discharged, dismissed, or are subject to an automatic stay of a bankruptcy order under Title 11 of the United States Code, this notice is for compliance and informational purposes only and does not constitute a demand for payment or any attempt to collect any such obligation and if we have obtained relief from the automatic stay of bankruptcy, we will only exercise our rights against the property itself. This notice is given pursuant to 11 U.S.C. Section 362(b) 11, if applicable.

RCP.PR.210226

**EXHIBIT D**

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Residential Capital Partners Secured Loan Fund VIII, LLC,

Plaintiff,

v.

Sine Qua Non Properties LLC, Texas Limited Liability Company, Scott Smith

Defendant(s).

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.:

SUMMONS AND NOTICES

(Non-Jury)

FORECLOSURE OF MORTGAGE

20-011200

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to appear and defend by answering the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer on the subscribers at their offices as 1201 Main Street, Suite 1450, Columbia, SC 29201, ~~within sixty (60) days after the service hereof, exclusive of the day of such service; except that the United States of America, if named, shall have sixty (60) days to answer after the service hereof, exclusive of the day of such service, and if you fail to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.~~

TO MINORS OVER FOURTEEN YEARS OF AGE, AND/OR TO MINORS UNDER FOURTEEN YEARS OF AGE AND THE PERSON WITH WHOM THE MINOR RESIDES, AND/OR TO PERSONS UNDER SOME LEGAL DISABILITY:

YOU ARE FURTHER SUMMONED AND NOTIFIED to apply for the appointment of a guardian ad litem within sixty (60) days after the service of this Summons and Notice upon you.

If you fail to do so, application for such appointment may be made by Attorney for Plaintiff.

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**EXHIBIT E**

3. In response to the paragraph captioned COUNTERCLAIM COUNT 1, Plaintiff admits so much of the paragraph as alleges it mailed Notice of Default to the Defendants. The remaining allegations of the paragraph are denied.

4. Plaintiff admits so much of the allegations of the paragraph captioned COUNTERCLAIM COUNT 2 as allege it returned money which was insufficient to cure the default. The remaining allegations of the paragraph are denied.

5. In response to the paragraph captioned DEFENDANT'S REQUEST FOR SANCTIONS, Plaintiff admits so much of the allegations as allege Plaintiff is the note holder. Plaintiff admits the Defendants were served. Plaintiff admits the Guarantor contacted Plaintiff's attorney. The remaining allegations are denied.

**FOR A SECOND DEFENSE**

**(Failure to State a Claim)**

6. Defendants' Counterclaim(s) are barred in whole or in part for failure to state a claim upon which relief can be granted.

**FOR A THIRD DEFENSE**

**(Default)**

~~The Defendants failed to file their Answers within thirty (30) days of service and are in default.~~

8. The Mortgagor is an LLC, but the Answer was not filed by a licensed South Carolina attorney as required by law.

**FOR A FOURTH DEFENSE**

**(Unclean Hands)**

9. The Defendants claims are barred or subject to reduction by the doctrine of unclean hands.

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