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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Master-in-Equity

Charles B. Simmons, Jr., Master in Equity

Case No. 2010-CP-23-3860
Appellate Case No.: 2021-000704

3009 Palm Boulevard, LLC

Petitioner

v.

Charles B. Simmons in his official capacity
as Master in Equity for Greenville County,
Rory Whelehan, in his Capacity as Court-
Appointed Receiver in the Matter of
Independence National Bank v. Buncombe
Professional Park, LLC and David Decarlis
s/a David D. Decarlis, Case No. 2010-CP-
23-3860, and Terry Howe and Associates,
Inc

Respondent

And

Independence National Bank,

Respondent,

Petition for Writ of Prohibition and Request for Expedited Consideration

TO: South Carolina Court of Appeals

Petitioner, 3009 Palm Boulevard, LLC, requests a Writ of Prohibition against the Greenville County Master in Equity, Rory Whelehan as Court Appointed Receiver, and Terry Howe & Associates, Inc., prohibiting and restraining the sale of real property it owns at 3009 Palm Blvd, Isle of Palms, SC. This Order has been appealed by David Decarlis. 3009 Palm Blvd, LLC is not a party to that matter and has no other recourse available to it.

Petitioner also requests Expedited Consideration of this matter given the limited time to fully protect the interests of Petitioner.

FACTS AND PROCEDURAL HISTORY

Petitioner is the sole title holder of real property at 3009 Palm Blvd, Isle of Palms, SC. Petitioner is not a party to the action that seeks to sell its property. The LLC obtained title from David Decarlis by deed filed on January 13, 2006 and recorded in Book K569 at Page 129 with the Charleston County RMC. Originally there were several members of the LLC, but Mr. Decarlis has been the sole member in excess of 10 years. The only asset of the Petitioner is the real property which it rents out for short term rentals on Isle of Palms, SC. The property is run as a business and the corporate formalities are properly maintained. There are currently two mortgages of record against the property to Suntrust Mortgage (now called Truist) and Regions Bank. The Suntrust Mortgage is dated April 22, 2005 and was originally taken out in the name of David Decarlis. The Regions Mortgage was given in 2008 is in the name of 3009 Palm Blvd, LLC. The current total debt on these two mortgages is approximately \$1,100,000.00.

There is also a third debt to Royal Blue Lending House, LLC, a Limited Liability Company headquartered on the Island of Nevis, that, at the time of this action, was secured by the property owned by 3009 Palm Blvd, LLC and Mr. Decarlis's home at 216 Cleveland Street, Greenville, SC. The debt on this mortgage is \$631,750. An order was entered by the Master in

Equity ordering that mortgage be satisfied of record. The satisfaction has been filed but that order is on appeal.

David Decarlis is the single member of the LLC. Independence National Bank holds a judgment against him in Greenville County. This judgment was filed on May 13, 2011 and reduced after the foreclosure sale to \$491,978.13. This judgment was appealed, and the appeal was resolved against Mr. Decarlis in April of 2015. At that time, the Plaintiff sought an execution and received a nulla bona. Nothing more was done until September of 2018 when another execution was filed again and another nulla bona was received.

During the supplemental proceedings, a charging lien was granted against Mr. Decarlis' distributions from 3009 Palm Blvd, LLC and he has been reporting the financial information of 3009 Palm Blvd, LLC to the receiver each month on the 15th of the month since October 2020. A copy of this motion filed by the receiver and the order are attached. 3009 Palm Blvd, LLC was sued by the receiver in case no. 2019-CP-23-07305. This was a case brought by the receiver claiming the granting of the mortgage from 3009 Palm Blvd to Royal Blue was a fraudulent transfer. That matter has been decided against Royal Blue but is still on going against the Petitioner and no final decisions have been made.

On June 11, 2021 the Greenville County Master in Equity issued an order in the Supplemental Proceedings in Case 2010-CP-23-3860 following the receiver's Motion to Establish Sales Procedures. In this order, the Master in Equity ordered that the Property of David Decarlis at 216 Cleveland Street, Greenville SC and the Property of 3009 Palm Blvd both be sold by private auction. This order noted that Mr. Decarlis is the sole member of 3009 Palm Blvd, LLC. At no time has 3009 Palm Blvd, LLC been made a party to this action, nor was the veil pierced. The Master in Equity has no jurisdiction over 3009 Palm Blvd, LLC or its property.

One July 2, 2021 David Decarlis appealed the Order directing the sale of the properties.

This property is currently being advertised as a private auction by Terry Howe & Associates, Inc. The auction is scheduled to conclude on July 23, 2021.

Petitioner is requesting consideration of this Petition prior to the end of the auction to protect its interests which will be irreparably harmed if the Respondents are not prohibited from continuing the sale.

ARGUMENT FOR WRIT OF PROHIBITION

A Writ of Prohibition exists, “to prevent an encroachment, excess, usurpation, or improper assumption of jurisdiction on the part of an inferior court or tribunal...” Berry v. Lindsay, 182 S.E.2d 78, 256 S.C. 282 (S.C. 1971) *citing* Ex Parte Jones, et al., 160 S.C. 63, 158 S.E. 134, 137 (1931).

In this case, the Master in Equity has no jurisdiction over 3009 Palm Blvd, LLC allowing him to order the sale of its property. The Master in Equity’s lack of jurisdiction extends to that of the Court-Appointed Receiver and the Auction house hired by the receiver as agents of the court. The only connection between this matter and 3009 Palm Blvd, LLC is that David Decarlis is the sole member of the LLC. No other argument for jurisdiction or authority has been made. While the court has personal jurisdiction over Mr. Decarlis and subject matter jurisdiction over his property, it has neither over the petitioner nor over the property of the petitioner. S.C. Code Ann. Section 33-44-201 says, “a limited liability company is a legal entity distinct from its members.” Furthermore, S.C. Code Ann. Section 33-44-501(a) says, “a member is not a co-owner of, and has no transferable interest in, property of a limited liability company.”

The LLC remains a separate and distinct person from Mr. Decarlis with its own rights

and property. If the sale is allowed to proceed, it will cloud the legal title of the LLC, interfere with the ability of 3009 Palm Blvd to effectively run and manage its business, and prevent it from paying its debts. There are no grounds whatsoever for this sale. Allowing this order to proceed unchecked has the possibility of harming the general public who would seek to purchase the property of 3009 Palm Blvd, LLC from this auction not knowing the Order was issued without jurisdiction or authority.

The sale process ordered by the judge will also cause irreparable harm to 3009 Palm Blvd, LLC and needs to be stopped. It is a business that manages a single property for short term rentals. There are rentals scheduled for months and there are debts that need to be paid. The sale of this property in this manner will cause rental reservations to be cancelled and prevent the LLC from being able to pay the debts to its creditors.

Furthermore, there is no other relief available for Petitioner that would prevent the sale of its property by the Court. It was never a party to this action. It has never been able to argue against this action. The respondent's sole argument seems to be that the company is a single member LLC so there is no requirement to observe the fact that it is a separate and distinct person from the member. This is not the law in South Carolina. Allowing this would eviscerate thousands of single-member LLCs in the state of South Carolina and be directly contrary to the clear laws of the State of South Carolina.

CONCLUSION

There is no authority cited in this case as to how or why the court has issued its order ordering the sale of the property belonging to 3009 Palm Blvd, LLC. The Court has exceeded its jurisdiction in issuing this decision and should be prohibited from the continued exercise of this

power. Therefore, the Writ of Prohibition should be issued prohibiting the sale of the property of 3009 Palm Blvd, LLC.

/s/Shawn M. French, Sr.

Shawn M. French, Sr.

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Mount Pleasant, SC 29464

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Attorney for Petitioner, 3009 Palm Blvd, LLC

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-23-03860

Independence National Bank

Plaintiff,

vs.

Buncombe Professional Park, LLC and
David DeCarlis s/a/ David D. DeCarlis,

Defendants.

**APPLICATION FOR CHARGING
ORDER**

Pursuant to S.C. Code Ann. §33-44-504, Rory D. Whelehan, in his Capacity as Court-Appointed Receiver in the above-captioned action (“Receiver”), hereby moves this Court for an Order charging the distributional interest of Defendant David DeCarlis in 3009 Palm Blvd., LLC for payment toward an unsatisfied judgment. Receiver respectfully sets forth and alleges as follows:

1. On or about August 2, 2011, Independence National Bank (“INB”) was granted a Judgment against David DeCarlis for the principal amount of \$491,978.13 with interest thereon from August 2, 2011 until paid in full, including, but not necessarily limited to, with interest at the legal rate for judgments (the “Judgment”). The Judgment was filed and entered in the Greenville County Judgment Roll Book on or about August 2, 2011.

2. On or about August 13, 2018, an Execution was issued requesting the Greenville County Sheriff’s Office Civil Division execute upon and satisfy the Judgment.

3. On or about August 28, 2018, the Greenville County Sheriff's Office Civil Division returned a Nulla Bona, having been unable to locate sufficient property for satisfaction of the Judgment.

4. INB commenced supplemental proceedings on or about September 25, 2018.

5. Receiver was duly appointed by Order for the Appointment of Receiver entered on November 12, 2019.

6. Upon appointment, Receiver commenced an investigation into the assets of Defendant David DeCarlis ("DeCarlis").

7. Upon information and belief, DeCarlis is the sole member of 3009 Palm Blvd., LLC ("3009 Palm"), a South Carolina limited liability company formed in 2005. A copy of the results of an online search of the South Carolina Secretary of State records is attached hereto as Exhibit A.

8. Upon information and belief, 3009 Palm owns real property located at 3009 Palm Blvd., Isle of Palms, South Carolina. A copy of the Deed filed in Charleston County is attached hereto as Exhibit B.

9. Upon information and belief, the real property owned by 3009 Palm is a beach home which is rented out to vacationers through online rental services such as HomeAway and/or VRBO, and the property generates significant rental income.

10. Pursuant to S.C. Code Ann. §33-44-504, upon application of a judgment creditor of a member of a limited liability company, "a court having jurisdiction may charge the distributional interest of the judgment debtor to satisfy the judgment."

11. The Judgment remains wholly unsatisfied, and Receiver believes a charging order against the interest of DeCarlis in 3009 Palm for the distributions due or to become due to DeCarlis could contribute to satisfaction of the Judgment.

WHEREFORE, Receiver hereby respectfully requests an Order:

1. Charging the distributional interest of David DeCarlis in 3009 Palm Blvd., LLC, a single member South Carolina limited liability company, with payment toward the unsatisfied amount of the Judgment in favor INB, with interest;
2. Requiring David DeCarlis and 3009 Palm Blvd., LLC, to pay to Receiver any and all distributions of 3009 Palm Blvd., LLC, accruing to David DeCarlis together with any other money due or to become due to 3009 Palm Blvd., LLC;
3. for such other and further relief the Court deems just and proper.

Respectfully submitted this the 22nd day of April, 2020.

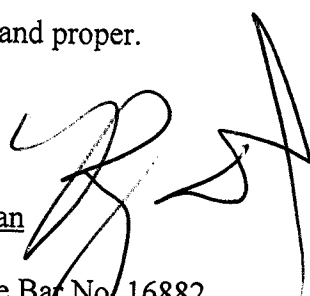

/s/ Rory D. Whelehan
Rory D. Whelehan
North Carolina State Bar No. 16882
South Carolina Bar No. 012915
Fed. I.D. No. 7657
Whelehan Law Firm, LLC
200 North Main Street, Suite 301-D
Greenville, South Carolina 29601
Tel: (864) 908-3917
Mobile: (864) 414-5216
E-mail: rwhelehan@whelehanlaw.com

EXHIBIT A

Business Entities Online

File, Search, and Retrieve Documents Electronically

3009 PALM BLVD., LLC

Corporate Information

Entity Type: Limited Liability Company

Status: Good Standing

Domestic/Foreign: Domestic

Incorporated South Carolina
State:

Important Dates

Effective Date 04/20/2005

Expiration N/A
Date:

Term End N/A
Date:

Dissolved N/A
Date:

Registered Agent

Agent: DAVID DECARLIS

Address: 216 CLEVELAND ST
GREENVILLE, South Carolina 29601

Official Documents On File

Filing Type	Filing Date
Change of Agent or Office	07/06/2006
Change of Agent or Office	11/15/2005
Organization	04/20/2005

EXHIBIT B

Title to Real Estate - JACQUI J LANIER, LLC 125 PELHAM COMMONS BLVD, STE 200, GREENVILLE, SOUTH CAROLINA 29615

NO TITLE EXAM

STATE OF SOUTH CAROLINA BK K 569PG129

COUNTY OF CHARLESTON) DEED
)

KNOW ALL MEN BY THESE PRESENTS, that DAVID D DECARLIS, for and in consideration of the sum of Ten Dollars and No Other Consideration, the receipt of which is hereby acknowledged, have/has granted, bargained, sold, and released, and by these presents do/does grant, bargain, sell and release unto 3009 PALM BLVD, LLC, all of his right, title, and interest in and to the following described property

ALL THAT CERTAIN LOT, PIECE OR PARCEL OF LAND, TOGETHER WITH THE BUILDINGS AND IMPROVEMENTS THEREON, SITUATE, LYING AND BEING ON THE ISLE OF PALMS, COUNTY OF CHARLESTON, STATE OF SOUTH CAROLINA, KNOWN AND DESIGNATED AS LOT 47, SECTION BC-2, AS SHOWN ON A PLAT MADE IN JUNE, 1945, BY WADE A. SANDERS, CE, AND RECORDED JUNE 14, 1945 IN THE RMC OFFICE FOR CHARLESTON COUNTY IN PLAT BOOK F AT PAGE 214, THE SAID LOT HAVING SUCH SIZE, SHAPE, AND DIMENSIONS, AND BEING BOUNDED AS SHOWN ON SAID PLAT, ALL DIMENSIONS BEING MORE OR LESS

THIS BEING THE SAME PROPERTY CONVEYED UNTO DAVID D DECARLIS BY DEED OF RICHARD A MITCHELL, JR. DATED APRIL 22, 2005 AND RECORDED IN DEED BOOK B 534, PAGE 83, CHARLESTON COUNTY RECORDS.

TMS: 5711000070

THIS conveyance is subject to all rights-of-way, zoning, easements, and restrictive or protective covenants recorded in the public records or actually appearing upon the ground

GRANTEE'S ADDRESS 125 Pelham Commons Blvd, Greenville, SC 29615

together with all and singular the rights, members, hereditaments and appurtenances to said premises belonging or in any wise incident or appertaining, to have and to hold all and singular the premise before mentioned unto the grantee(s), and the grantee's(s') heirs or successors and assigns, forever

WITNESS, the grantor's(s') hand(s) and seal(s) on this the 12 day of Decembe 2005
SIGNED, sealed and delivered in the presence of

Lucy Harreton

David D DeCarlis (SEAL)
David D DeCarlis

[Signature]

STATE OF SOUTH CAROLINA
COUNTY OF Greenville

Affidavit

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says

- 1 I have read the information on this affidavit and I understand such information
- 2 The property being transferred is located at 3009 Palm Blvd
bearing Greenville County Tax Map Number _____, was transferred
by David DeCarlis
to 3009 Palm Blvd, LLC on 12/12/05
- 3 Check one of the following The deed is
 - (a) _____ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth
 - (b) subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary
 - (c) _____ exempt from the deed recording fee because (see information section of affidavit) #8 (If exempt, please skip items 4 - 7 and go to item 8 of this affidavit)
- 4 Check one of the following if either item 3(a) or item 3(b) above has been checked (see information section of this affidavit)
 - (a) _____ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of _____
 - (b) _____ The fee is computed on the fair market value of the realty which is _____
 - (c) _____ The fee is computed on the fair market value of the realty as established for property tax purposes which is _____
- 5 Check Yes _____ or No _____ to the following A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer If "yes" the amount of the outstanding balance of this lien or encumbrance is _____
- 6 The deed recording fee is computed as follows
 - (a) Place the amount listed in item 4 above here _____
 - (b) Place the amount listed in item 5 above here _____
(If no amount is listed, place zero here)
 - (c) Subtract line 6(b) from line 6(a) and place result here _____
- 7 The deed recording fee due is based on the amount listed on line 6(c) above and the deed recording fee due is _____
- 8 As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as Attorney for Grantor
- 9 I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both

SWORN to before me this 20th
day of December 2005
P. Sandra Smith
Notary Public for SC
My Commission Expires 9/1/2010

David DeCarlis
Responsible Person Connected with the Transaction
Josqui Lanier
Print or Type Name Here

INFORMATION

Except as provided in this paragraph the term value means the consideration paid or to be paid in money or money's worth for the realty. Consideration paid or to be paid in money's worth includes but is not limited to other realty, personal property, stocks, bonds, partnership interest and other intangible property, the forgiveness or cancellation of a debt, the assumption of a debt, and the surrendering of any right. The fair market value of the consideration must be used in calculating the consideration paid in money's worth. Taxpayers may elect to use the fair market value of the realty being transferred in determining fair market value of the consideration. In the case of realty transferred between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, and in the case of realty transferred to a trust or as a distribution to a trust beneficiary, value means the realty's fair market value. A deduction from value is allowed for the amount of any lien or encumbrance existing on the land, tenement, or realty before the transfer and remaining on the land, tenement, or realty after the transfer. Taxpayers may elect to use the fair market value for property tax purposes in determining fair market value under the provisions of the law.

Exempted from the fee are deeds

- (1) transferring realty in which the value of the realty as defined in Code Section 12-24-30 is equal to or less than one hundred dollars
- (2) transferring realty to the federal government or to a state, its agencies and departments, and its political subdivisions, including school districts
- (3) that are otherwise exempted under the laws and Constitution of this State or of the United States
- (4) transferring realty in which no gain or loss is recognized by reason of Section 1041 of the Internal Revenue Code as defined in Section 12-6-40(A)
- (5) transferring realty in order to partition realty as long as no consideration is paid for the transfer other than the interests in the realty that are being exchanged in order to partition the realty
- (6) transferring an individual grave space at a cemetery owned by a cemetery company licensed under Chapter 55 of Title 39
- (7) that constitute a contract for the sale of timber to be cut
- (8) transferring realty to a corporation, a partnership, or a trust in order to become, or as a stockholder, partner, or trust beneficiary of the entity, provided no consideration is paid for the transfer other than stock in the corporation, interest in the partnership, beneficiary interest in the trust, or the increase in value in such stock or interest held by the grantor. However, the transfer of realty from a corporation, a partnership, or a trust to a stockholder, partner, or trust beneficiary of the entity is subject to the fee even if the realty is transferred to another corporation, a partnership, or trust.
- (9) transferring realty from a family partnership to a partner or from a family trust to a beneficiary, provided no consideration is paid for the transfer other than a reduction in the grantee's interest in the partnership or trust. A family partnership is a partnership whose partners are all members of the same family. A family trust is a trust, in which the beneficiaries are all members of the same family. The beneficiaries of a family trust may also include charitable entities. Family means the grantor and the grantor's spouse, parents, grandparents, sisters, brothers, children, stepchildren, grandchildren, and the spouses and lineal descendants of any of the above. A charitable entity means an entity which may receive deductible contributions under section 170 of the Internal Revenue Code as defined in Section 12-6-40(A)
- (10) transferring realty in a statutory merger or consolidation from a constituent corporation to the continuing or new corporation
- (11) transferring realty in a merger or consolidation from a constituent partnership to the continuing or new partnership, and
- (12) that constitute a corrective deed or a quitclaim deed used to confirm title already vested in the grantee, provided that no consideration of any kind is paid or is to be paid under the corrective or quitclaim deed
- (13) transferring realty subject to a mortgage to the mortgagee, whether by a deed in lieu of foreclosure executed by the mortgagor or deed executed pursuant to foreclosure proceedings
- (14) transferring realty from an agent to the agent's principal in which the realty was purchased with funds of the principal, provided that a notarized document is also filed with the deed that establishes the fact that the agent and principal relationship existed at the time of the original purchase as well as for the purpose of purchasing the realty
- (15) transferring title to facilities for transmitting electricity that is transferred, sold, or exchanged by electrical utilities, municipalities, electric cooperatives, or political subdivisions to a limited liability company which is subject to regulation under the Federal Power Act (16 U.S.C. Section 791(a)) and which is formed to operate or to take functional control of electric transmission assets as defined in the Federal Power Act

BK K 569PG133

RECORDER'S PAGE

NOTE This page **MUST** remain with the original document



Filed By

JACQUI J LANIER
125 PELHAM COMMONS BLVD
GREENVILLE SC 29615

FILED
January 13, 2006
12 25 27 PM
BK K 569PG129
Charlie Lybrand, Register
Charleston County, SC

DESCRIPTION	AMOUNT
Recording Fee	\$ 10 00
State Fee	<Exempt>
County Fee	<Exempt>
Postage	
TOTAL	\$ 10 00
\$ Amount (in thousands)	
DRAWER	B -bj

AUDITOR STAMP HERE
RECEIVED FROM RMC
MAR - 1 2006
PEGGY A MOSELEY
CHARLESTON COUNTY AUDITOR

PID VERIFIED BY ASSESSOR
REP *[Signature]*
DATE 3/1/06

DO NOT STAMP BELOW THIS LINE

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Independence National Bank,

Plaintiff,

vs.

Buncombe Professional Park, LLC and
David DeCarlis s/a David D. DeCarlis

Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2010-CP-23-03860

CHARGING ORDER

THIS MATTER was before the court on May 29, 2020 pursuant to Receiver's Application for Charging Order filed on April 22, 2020. The hearing was held via ZOOM with Shawn French, Esq., Aaron J. Angell, Esq., and Rory Whelehan Esq. all being present and all consenting to the matter being held via ZOOM.

FINDINGS OF FACT

The following facts were introduced at the May 29, 2020 hearing:

- A) The Defendant, David DeCarlis is the single member of "3009 Palm Blvd., LLC", a South Carolina limited liability company, as confirmed by his testimony at his Court Ordered Deposition held on August 12, 2019. (Exhibit A).
- B) 3009 Palm Blvd, LLC is the sole owner of real property located at 3009 Palm Blvd, Isle of Palms, SC 29451.
- C) The beach house located at 3009 Palm Blvd. is rented through VRBO and typically accommodates renters who pay to rent the property for an entire week in the summer at peak rates and throughout the year.

- D) This Court's November 12, 2019 Order for the Appointment of a Receiver granted the Receiver with "all powers, authority, duties and obligations as is customary according to receivership under South Carolina law".
- E) The Court finds that pursuant to the Order for the Appointment of a Receiver, the Receiver has the authority to bring this application for a Charging Order in addition to the authority to file any and all civil actions, complaints, and motions, along with any and all other actions powers, authority, duties and obligations required to carry the judgment into effect pursuant to S.C. Code Ann. §15-65-10 and as is customary under South Carolina law.

CONCLUSIONS OF LAW

In light of the evidence, testimony and arguments submitted by the Parties, this Court hereby issues the following Orders

IT IS HEREBY ORDERED, the Receiver is granted with a Charging Order and lien against the Defendant's distributional interest in 3009 Palm Blvd., LLC, a single-member LLC, with payment toward the unsatisfied amount of the Judgment in favor of INB, with interest;

IT IS FURTHER ORDERED, that David DeCarlis and 3009 Palm Blvd., LLC pay to Receiver any and all distributions of 3009 Palm Blvd., LLC, accruing to David DeCarlis;

IT IS FURTHER ORDERED, that pursuant to §33-44-504(b), this Court may order a foreclosure of the lien on the Defendant's distributional interest subject to this Charging Order at any time.

AND IT IS SO ORDERED.



Greenville Common Pleas

Case Caption: Independence National Bank vs. Buncombe Professional Park Llc ,
defendant, et al
Case Number: 2010CP2303860
Type: Master/Order/Other

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Independence National Bank,

Plaintiff,

vs.

Buncombe Professional Park, LLC and David
DeCarlis s/a David D. DeCarlis,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2010-CP-23-03860

ORDER

This matter came before the Court on May 27, 2021 upon the Motion to Establish Sales Procedures for Sales of Property (the “Sales Motion”). The Sales Motion was filed by the Receiver on April 23, 2021 and duly noticed to all parties along with notice of the hearing on the Sales Motion. DeCarlis filed a Memorandum in Opposition to Motion Determine Sale Procedures on May 27, 2021 (the “Objection”). Because the Objection was filed on the day of the hearing and alleged that the judgment at issue in this matter had expired, the Court solicited post-hearing briefing by Receiver on the issue of the expiration of the judgment. Receiver submitted a Brief to this Court on June 1, 2021 by electronic mail (the “Brief”). The Brief was then attached to Receiver’s Forty-First Report filed with this Court on June 2, 2021. The matter is now ripe for decision. Upon consideration of the Sales Motion, the Objection, the Brief, and the arguments of counsel at the hearing, the Court finds and concludes as follows:

1. Receiver was appointed by this Court pursuant to an order entered on November 12, 2019.

2. Receiver has been appointed in this matter in connection with efforts to enforce a judgment obtained by Independence National Bank (“Independence”) against DeCarlis. See, 2010-CP-23-03860.
3. The judgment stems from a foreclosure proceeding commenced on May 14, 2010 by Independence against DeCarlis and other defendants. The foreclosure proceeding sought a deficiency judgment against DeCarlis.
4. On May 13, 2011, this Court entered a Decree of Foreclosure. The Decree of Foreclosure stated that “after the proceeds of [the foreclosure] sale is applied to the indebtedness due as outlined above, said deficiency shall be assessed against all Defendants and Plaintiff shall have personal judgment against said Defendants for the amount of said deficiency.”
5. The Decree of Foreclosure further stated that “[p]laintiff has reserved the right to waive deficiency until the date and time of sale.”¹
6. The Decree of Foreclosure further stated that “this action shall remain open for any other proper purpose.”
7. On August 2, 2011, this Court entered an Order for Deficiency Judgment (the “Deficiency Judgment”). The Deficiency Judgment stated that “Plaintiff, Independence National Bank, have judgment against the Defendants, Buncombe Professional Park, LLC; and David DeCarlis, s/a David D. DeCarlis; in the amount of \$491,978.13, with interest thereon from July 13, 2011 until paid in full at the legal rate of judgments, as changed from time to time.”

¹ In the Decree of Foreclosure, “Plaintiff” refers to Independence and “Defendants” includes DeCarlis.

8. Pursuant to the Sales Motion, Receiver seeks authority from the Court to set and establish the procedures by which Receiver may sell or otherwise dispose of properties of DeCarlis (or his wholly owned limited liability company). The properties include DeCarlis' primary residence located in Greenville County, South Carolina and which is owned with DeCarlis' wife, Tiffany DeCarlis and a beach house located in Charleston County, South Carolina and owned by 3009 Palm Blvd. LLC.²

The Judgment

9. While the Sales Motion seeks authority for the disposition of certain properties owned by DeCarlis or his wholly-owned limited liability company, DeCarlis raises the expiration of the "judgment" as a complete defense to the Sales Motion. Therefore, the Court will address the issue of the "judgment."
10. First, the Law of the Case Doctrine requires a conclusion that the judgment would not expire until at least August 2, 2021. On October 8, 2019, this Court entered its Order for Repatriation of Assets (the "Repatriation Order"). The Repatriation Order found that the "judgment" was recorded on August 2, 2011. DeCarlis was a party to the Repatriation Order. This finding by the Court was not appealed and, therefore, is now law of the case precluding some other date. Thus, under the Law of the Case Doctrine, the date of the "judgment" is, in fact, the date of the Deficiency Judgment. See generally Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285("[A]n unappealed ruling, right or wrong, is the law of the case.").
11. Second, while the Foreclosure Decree was entered on May 13, 2011, it did not establish a money judgment until the date of the Deficiency Judgment. The Foreclosure Decree

² DeCarlis is the sole member of 3009 Palm Blvd., LLC.

- clearly states at paragraph 16 that the amount due is “anticipated.” Thus, the amount due would not and could not be established until after the sale of the property and a determination as to whether a deficiency existed. Put another way, there was no debt to attempt execution upon until a sum certain or defined dollar amount was entered as a judgment.
12. Moreover, S.C. Code Ann. 29-3-660 specifically addresses deficiency judgments. This statute provides the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that remains unsatisfied after a sale of the mortgaged premises. Section 29-3-660 further provides that if the debt at issue is secured by the obligation of any other party other than the mortgagor the plaintiff may make that person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after the sale of the mortgaged premises against that other party and may enforce such judgment as in other cases.
13. Section 29-3-660 is an independent statute that does not relate back to S.C. Code Ann. 29-3-650. Specifically, section 29-3-660 does not provide that the deficiency amount established following a sale be then credited against the amount determined in section 29-3-650. To the contrary, section 29-3-660 provides that deficiency judgments are themselves judgments that may be enforced as in other cases.
14. If DeCarlis’ construction of section 29-3-650 were correct, i.e., that the amount due following a sale of property at foreclosure is a “credit”, then there would be no need for section 29-3-660 and the statute – which itself is captioned “Deficiency judgment” – would be a nullity. See generally Federal Land Bank v. Davant, 292 S.C. 172, 355 S.E.2d 293 (1987).

15. Third, the unique facts of the instant case illustrates what would be the harshness of a strict application of Gordon v. Lancaster, 425 S.C. 386, 823 S.E.2d 173 (2018). In the instant case, the initial appeals by DeCarlis first to the South Carolina Court of Appeals and then to the South Carolina Supreme Court exhausted almost five years of the ten-year judgment lifespan. Then, once execution of the judgment herein was sought (admittedly with some early delays by Independence), DeCarlis has filed multiple appeals (some pursued while others dismissed for failure to prosecute).
16. The various orders entered in the instant case over the years provide clear evidence of the efforts that have been undertaken (both pre-judgment and post-judgment) to avoid payment of the judgment debt. If this case were not to fall within the Linda Mc (398 S.C. 542, 703 S.E.2d 499 (2010)), exception discussed in Gordon, there will likely be an outcome that rewards the machinations and delays orchestrated by a judgment debtor. This Court believes strong policy considerations and practical reasons exist for a Linda Mc analysis or a hybrid approach whereby appeals by a judgment debtor arising out of an order that is not reversed or modified would toll the collection period.

The Sales Procedures

17. Returning to the merits of the Sales Motion, this Court finds that the Sales Motion should be granted as follows: Based on the exigent circumstances relating to the possibility that the judgment lien will be expiring on August 2, 2021, the properties shall be sold 'as is' by private auction with a reputable auctioneering firm chosen by the Receiver. Upon execution of a contract by the Receiver with the auctioneer, the properties shall be sold within twenty-one (21) days with a buyer's premium, where the auctioneer is paid by purchaser a commission, not exceeding 10%.

18. The properties shall be sold by auction as discussed above and shall be subject to any and all prior liens (if any).

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT:

1. Receiver's Sales Motion is granted as set forth herein; and
2. Upon Receiver's entry into a contract with an auctioneer to be chosen by Receiver, the properties shall be sold by auction within twenty-one days of Receiver's contract with auctioneer; and
3. The auction shall be "buyer's premium" with the properties being sold subject to any and all prior liens (if any); and
4. DeCarlis' Objection is denied and overruled.

AND IT IS SO ORDERED.

JUDGE'S SIGNATURE PAGE TO FOLLOW



Greenville Common Pleas

Case Caption: Independence National Bank vs. Buncombe Professional Park Llc ,
defendant, et al
Case Number: 2010CP2303860
Type: Master/Order/Other

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)

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Jul 09 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Master-in-Equity

Charles B. Simmons, Jr., Master in Equity

Case No. 2010-CP-23-3860
Appellate Case No.: 2021-000704

3009 Palm Boulevard, LLC

Petitioner

v.

Charles B. Simmons in his official capacity
as Master in Equity for Greenville County,
Rory Whelehan, in his Capacity as Court-
Appointed Receiver in the Matter of
Independence National Bank v. Buncombe
Professional Park, LLC and David Decarlis
s/a David D. Decarlis, Case No. 2010-CP-
23-3860, and Terry Howe and Associates,
Inc

Respondent

And

Independence National Bank,

Respondent,

Proof of Service

I certify that I have served the Petition for Writ of Prohibition and Expedited Consideration by depositing a copy of it in the United States Mail, postage prepaid, addressed to its attorneys of record listed below.

Rory Whelehan
200 North Main Street,
Suite 301-D Greenville, SC 29601

Terry Howe & Associates, Inc
4328 Wade Hampton Blvd
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Taylors, SC 29687

Aaron Angell
200 N. Main St
Greenville, SC 29601

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212 Newberry Street NW
Aiken, SC 29801

Christopher Jones
650 E. Washington Street
Greenville, SC 29601

July 9, 2021

/s/Shawn M. French, Sr.
Shawn M. French, Sr.
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Attorney for Petitioner, 3009 Palm Blvd, LLC



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Jul 09 2021
SC Court of Appeals

JULY 9, 2021

VIA US MAIL AND EMAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: 3009 Palm Blvd, LLC v. Greenville County Master in Equity, et al.
Case No.: 2019-CP-23-7350
Appellate Case 2021-000704

To Whom It May Concern,

Please find enclosed a Petition for Writ of Prohibition and Request for Expedited Consideration and Proof of Service. I am sending the \$50.00 Filing Fee via US mail.

If you have any questions, you can contact me at the below number.

Sincerely,

Shawn M. French