THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Richard L. Booth, Master-in-Equity

Common Pleas Case No. 2009-CP-43-2538
Appellate Case No. 2013-000255

First Citizens Bank and Trust Company, Inc.,.....Respondent,

v.

Charles T. Brooks, III and the South Carolina Department of Revenue, Defendants,

Of Whom Charles T. Brooks, III, is.....Appellant.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

COURT RULES

STATEMENT OF ISSUES

I. Did the lower court err in making a factual finding that "the forbearance agreement also provided for ongoing payment of the monthly payments due under the Note and Line of Credit[,]" in addition to the payments called for under the language of the forbearance agreement, where ambiguity in the document (particularly when coupled with the parties' course of dealing) created an issue of material fact on that point?

II. Did the lower court err in making a factual finding that "[t]he forbearance agreement contained a term that stated that acceptance of monies under the agreement was not an estoppel, prejudice or waiver of Plaintiff's right to proceed with the foreclosure action" without also making findings as to other language in the documents at issue that makes the term ambiguous?

III. Did the lower court err in making a factual finding that "the Defendant breached the terms of the forbearance agreement by failing to withdraw his Answer in this matter" when the record showed an issue of fact about that and, in any event, the matters in dispute arose well after the answer was served?

STATEMENT OF THE CASE

Respondent (hereinafter "First Citizens") filed a summons and complaint on October 30, 2009, seeking foreclosure of a mortgage given to a predecessor bank by Appellant (hereinafter "Brooks"). (R. pp. _____; Summons and Complaint.) Brooks timely served and filed an answer to the complaint. (R. pp. _____; Order p. 3; Answer.) Brooks' answer contained only admissions and denials of First Citizens' allegations and did not assert any affirmative defenses or counterclaims. (R. pp. _____; Answer.)

First Citizens and Brooks reached a settlement, which was memorialized in two documents, one entitled "Release and Settlement Agreement" and the other (not dated) entitled "Forbearance Agreement – In Foreclosure." (R. pp. _____; Exhs. C and D to Affidavit of Davies.) Under the forbearance agreement, Brooks was required to make an initial $5,000.00 payment and monthly $1,500.00 payments to First Citizens until March 1, 2011. (R. pp. _____; Exh. D to Affidavit of Davies). Brooks made monthly payments pursuant to the forbearance agreement, which were accepted by First Citizens for several months after March 1, 2011. (R. pp. _____; Order p. 5.)

On August 9, 2012, First Citizens served a motion for summary judgment. (R. pp. _____; Certificate of service of motion for summary judgment.) The text of the motion simply stated that it was made "on the grounds that there is no genuine issue as to any material fact and the Plaintiff is entitled to an Order for Foreclosure and Sale as a matter of law. Said motion shall be based upon the statute and case law of the State of South Carolina, upon the pleadings and other evidence developed in

discovery and upon the affidavits attached hereto and other material properly received by the Court in connection therewith." (R. pp. _____; Motion for summary judgment.) It attached an affidavit of Dave Davies, to which were in turn attached a copy of a note, a mortgage, and the "Release and Settlement Agreement" and "Forbearance Agreement – In Foreclosure" mentioned above. (R. pp. _____; Affidavit of Davies and Exhs. A, B, C, & D thereto.) Davies' affidavit contained the following statement

> On March 7, 2010, Charles T. Brooks entered into a Settlement Agreement with the Plaintiff in which for valuable consideration, Plaintiff agreed to allow Mr. Brooks to enter into a forbearance agreement on the above referenced defaulted Note and Mortgage. The Settlement Agreement attached hereto as Exhibit "C" and Forbearance Agreement attached hereto as Exhibit "D" are incorporated by reference as if fully set forth verbatim. The terms of the Settlement Agreement provided in part that Charles T. Brooks agreed to withdraw his Answer in the above captioned case. Charles T. Brooks has failed to comply with the provisions of the Settlement Agreement.

(R. pp. _____; Affidavit of Davies p. 3.)

Davies' affidavit contained no other statements about a purported default of the settlement agreement or the forbearance agreement. (R. pp. _____; Affidavit of Davies.) The forbearance agreement document attached to the affidavit states that Brooks "hereby withdraws its [sic] answer and defenses with prejudice[.]" (R. pp. _____; Affidavit of Davies Exh. D p. 2.)

On October 9, 2012, before the summary judgment hearing, Brooks timely served his own affidavit, which he filed with the court. (R. pp. _____; Order p. 2; Affidavit of Brooks.) Brooks' affidavit states as follows:

> Up to around Christmas of 2011, I continued to make the monthly forbearance payments to First Citizens in the monthly payment amounts. First Citizens always accepted those payments.
>
> After I fell behind in those payments, I asked First Citizens, through its counsel, to provide me with a reinstatement figure to bring those payments current. As the attached emails show, First Citizens would not provide that to me.
>
> At the time I requested the reinstatement figure, I could have brought the monthly payments current; however, First Citizens would not provide me with a reinstatement figure, much less accept a payment to bring the loan current.

(R. pp. _____; Affidavit of Brooks.) Printouts of emails between Brooks and counsel for First Citizens were attached to the affidavit and confirmed First Citizens would not provide Brooks a reinstatement figure. (R. pp. _____; attachments to affidavit of Brooks.)

On November 19, 2012, the Sumter County Master-in-Equity held a hearing[1] on the motion for summary judgment, after which he issued an order that was filed January 23, 2013. (R. pp. _____; Order p. 1.) That order contained the following:

> In support the Motion for Summary Judgment, the Plaintiff submitted an Affidavit and counter-Affidavit of a business records custodian for the Plaintiff. The Defendant Brooks also filed and timely served an Affidavit in opposition to the Plaintiff's motion.
>
> The Plaintiff argued at the hearing that the affidavits it filed established the debt amount owing and that Defendant Brooks is in default of the note, mortgage, and forbearance agreement (which are described below). The Plaintiff argued that, coupled with an affidavit of attorneys' fees and costs that Plaintiff's

[1] No court reporter was present at the hearing, which arguably prevented compliance with Rule 71(a), SCRCP. ("In all [foreclosure] actions a record of hearings shall be made and preserved in the case file in the office of the clerk of court.")

counsel stated he was ready to submit, these materials showed that the Plaintiff was entitled to judgment as a matter of law. The Plaintiff argued that Defendant Brooks' affidavit failed to show the existence of a genuine issue of material fact because, even taking the statements in that affidavit as true, Defendant Brooks was still in default of the written terms of the forbearance agreement. Defendant Brooks argued that the Plaintiff's continued acceptance for some months of payments less than the balance due under the written terms of the forbearance agreement (the balance of the loan) constituted either a modification of the terms of the note, mortgage, and/or forbearance agreement through a course of dealing and conduct between the parties, an estoppel or laches of the Plaintiff's right to declare a default under the terms of the forbearance agreement as written, or a waiver of any such default. Defendant Brooks maintained that the evidence showed at least an issue of material fact as to these matters. He provided the Court and Plaintiff's counsel with copies of Rakestraw v. Dozier Assocs., Inc., 285 S.C. 358, 329 S.E.2d 437 (1985), and King v. PYA/Monarch, Inc., 317 S.C. 385, 453 S.E.2d 885 (1995), and argued that these cases support his argument. The Plaintiff countered with an argument that the parol evidence rule precluded Defendant Brooks' arguments because the forbearance agreement was an integrated writing. Defendant Brooks countered by stating that a contract may be modified by means other than writing even if it states that modifications must be in writing and that, since the conduct at issue occurred after the execution of the forbearance agreement, it did not fall within the ambit of the parol evidence rule. Defendant Brooks contended that all ambiguities in the operative documents should be construed against the Plaintiff. The Plaintiff acknowledged that it drafted the documents at issue but denied that there are any material ambiguities in them. Defendant Brooks contended that, under the requirements of equity and the operative terms between the parties as affected by the conduct between them, the Plaintiff could not treat the loan as matured and was required to let Defendant Brooks reinstate by bringing current the amount that would have been paid had he continued making $1500.00 monthly payments to the present day, that the Plaintiff had refused to let him do that, and that the

course of conduct between the parties created a fact issue as to whether he has a right to reinstate, a fact issue as to what the debt amount owed to the Plaintiff is, and a fact issue as to whether the Plaintiff is entitled to foreclosure. The Plaintiff argued that there was no genuine issue of material fact because the affidavits on file showed that Defendant Brooks was in default of the terms of the note, the terms of the mortgage, and the terms of the forbearance agreement.

After reviewing and taking into consideration the pleadings and affidavits submitted in this case as well as the arguments presented at the motion hearing, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT:

1) The Lis Pendens was filed on July 23, 2009. An Amended Lis Pendens was filed on October 30, 2009.

2) The Summons and Complaint were filed on October 30, 2009.

3) Service was made upon the Defendants as shown by the proof of service filed herein.

4) The Defendants filed and timely served responsive pleadings.

5) The Defendants and all attorneys of record were notified of the time, date, and place of the hearing in this matter.

6) For value received, Charles T. Brooks III made, executed and delivered a note ("Note") dated May 12, 2005, promising thereby to pay to the order of Sumter National Bank the sum of One Hundred Twelve Thousand and 00/100 ($112,000.00) Dollars, with interest at the rate of 7.50% per annum, with a current rate of 4.2500% per annum. Other terms and conditions are stated in the Note, which is of record herein.

7) To better secure the payment of the Note described above, Charles T. Brooks III made, executed,

and delivered to Sumter National Bank a certain real estate mortgage ("Mortgage") in writing, dated May 12, 2005, covering real property in Sumter County, which is the same as that described in the Complaint. The Mortgage provided for the anticipation of future advances secured by the Mortgage subject to the maximum principal amount secured by the mortgage at any one time shall not exceed $112,000.00.

8) The Mortgage was filed in the Office of the Register of Mesne Conveyances/Register of Deeds for Sumter County on May 12, 2005, in Book 980 at Page 770. Thereafter, on October 1, 2006, Sumter National Bank merged into and subsequently operated as part of Community Resource Bank, National Association; thereafter, on November 1, 2008, Community Resource Bank, National Association, merged into and subsequently operated as part of First Citizens Bank and Trust Company, Inc., leaving First Citizens Bank and Trust Company, Inc. as the surviving entity.

9) The Note and Mortgage matured on May 5, 2010.

10) On July 27, 2007, Charles T. Brooks III made, executed, and delivered to Community Resource Banks, National Association, a Note for a line of credit ("Line of Credit") in the amount of $30,150.00.

11) To better secure the payment of the Line of Credit described above, Charles T. Brooks III agreed in writing that the Mortgage dated May 12, 2005, and more fully described above would also serve as additional security for the Line of Credit, but subject to the extent of the future advance clause limit expressed in the mortgage.

12) The Line of Credit matured on August 2, 2008.

13) The Mortgage evidences and secures the repayment of money advanced by the mortgagee to, or on behalf of, the mortgagors and constitutes a first mortgage lien on the mortgaged premises.

14) The Plaintiff is the real party in interest pursuant to SCRCP 17(a).

15) The titleholder of record of the subject property as of the filing of the Lis Pendens in this action is Charles T. Brooks III, who is the original mortgagor.

16) The loan evidenced by the Note and Mortgage is not owned, securitized or guaranteed by Fannie Mae or Freddie Mac, and is not serviced by a servicer participating in the Home Affordable Modification Program (HAMP). Therefore the Court finds that there are no HAMP issues to be resolved before foreclosure is ordered or the sale is commenced.

17) As stated in the Certification of Exemption from Administrative Order 2011-05-02-01 filed herein, the real property which is the subject of this action is not an "owner occupied dwelling" as defined in the Order.

18) The Defendant Brooks defaulted on the Note and Mortgage on or about March 2, 2009.

19) The Defendant Brooks defaulted on the Line of Credit, also secured by the Mortgage, on August 2, 2008 when the Line of Credit matured.

20) The Plaintiff and the Defendant Brooks entered into a release and settlement agreement dated April 7, 2010, which was a valid and binding agreement and also entered into a forbearance agreement which was a valid and binding agreement in which, among other things, Defendant Brooks agreed to pay the sum of $1,500.00 per month toward arrearage beginning April 1, 2010 and ending March 1, 2011, at which time the remaining balance became due and payable. The forbearance agreement also provided for ongoing payment of the monthly payments due under the Note and Line of Credit proper, but was silent on the issue of the maturity of the original note and the post-maturity status of the line of credit note during the forbearance period.

21) The forbearance agreement contained default terms that provided for acceleration of all unpaid amounts under both the agreement and the loan documents.

22) The forbearance agreement contained a term that stated that acceptance of monies under the agreement was not an estoppel, prejudice or waiver of Plaintiff's right to proceed with the foreclosure action.

23) The forbearance agreement provided in part that Defendant Brooks would withdraw his answer in this matter and the Defendant breached the terms of the forbearance agreement by failing to withdraw his Answer in this matter but in any event, the Answer has not been withdrawn.

24) Defendant Brooks made monthly payments pursuant to the forbearance agreement which were accepted by Plaintiff for several months after the maturity date of the original forbearance agreement but has not paid the balance of unpaid amounts due under the forbearance agreement or the loan documents.

25) All payments made under the terms of the loan documents and after entry into the forbearance agreement are not accounted for in the affidavits submitted by the Plaintiff.

CONCLUSIONS OF LAW

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1) That there is no genuine issue of any material fact as to the findings setting forth in paragraphs 1 through 25 above and Defendant Brooks is prohibited from further contesting those findings in future proceedings.

2) That the Court convene a non-jury trial on February 7th, 2013 at 11:00 A.M., at which time the parties will present evidence as to the following remaining issues:

a. The balance due Plaintiff after giving credit for all payments made pursuant to the loan documents and also the forbearance agreement;

b. The intention of the parties in Defendant Brooks' payment of and Plaintiff's acceptance of

> monthly forbearance payments after the March 1, 2011 maturity date of the original forbearance agreement, the relevance of the language of the forbearance agreement referring to acceptance of payments, and the effect on Plaintiff's right to proceed with foreclosure;
>
> c. Whether or not Plaintiff [sic] made any monthly payments as they came due under the existing loan documents after entering into the settlement and forbearance agreements, and the effect of the forbearance agreement upon the post-maturity status of the line of credit note at the inception of the forbearance agreement and the maturity of the real estate note and mortgage during the forbearance period.

(R. pp. _____; Order pp. 2-6.)

This appeal followed.

STATEMENT OF FACTS

First Citizens and Brooks settled their foreclosure case by entering into a settlement agreement memorialized in two documents drafted by someone on behalf of First Citizens, one dated April 7, 2010, and entitled "Release and Settlement Agreement" and the other (not dated) entitled "Forbearance Agreement – In Foreclosure." (R. pp. _____; Order p. 2; Exhs. C and D to Affidavit of Davies.) Those documents are rife with ambiguities. (R. pp. _____; Exhs. C and D to Affidavit of Davies.) The "Release and Settlement Agreement" document provides in material terms as follows:

> Brooks and First Citizens now desire to settle, compromise, and resolve the foreclosure action pursuant to the terms and conditions hereinafter set forth in this settlement agreement.
>
> . . .
>
> **Settlement Terms.** Brooks shall (1) sign a separate forbearance agreement on the Office Mortgage [which

is how the parties referred to the mortgage at issue – Brooks had other properties mortgaged with the same bank] to resume payments plus arrearage for a period of 12 months, at the conclusion of which a balloon payment will be due for the entire amount due; . . . (4) refinance the Office Mortgage to include the deficiency amounts once [other properties mortgaged to the same bank] have sold and the deficiency amounts are fixed; . . . [and,] in consideration for First Citizens to (1) hold the foreclosure on the Office Mortgage as long as the Court will allow or until Brooks defaults on any portion of this Agreement[.]

Covenant Not To Sue. Brooks agrees to withdraw his Answers in the current litigation . . . and agrees to take any actions necessary to facilitate the dismissal of the foreclosure. . . .

(R. pp. _____; Exh. C to Affidavit of Davies.)

The forbearance agreement document materially provides as follows:

1. Lender's Forbearance. Lender [First Citizens] shall forbear from exercising any and all of its rights and remedies presently existing or arising during the term of this Agreement under the Loan Documents, the ongoing foreclosure action or this Agreement, provided that there exists no Event of Default as such term is defined herein at Paragraph 5;

2. . . . Borrower [Brooks] hereby withdraws its [sic] answer and defenses with prejudice;

3. Borrowers Payment of the Arrears. THIS FORBEARANCE AGREEMENT IS NOT DESIGNED TO CURE THE ARREARAGE. The intent of this agreement is to provide time for the Lender to sell other properties deeded to it from Borrower as part of a separate Settlement and Release Agreement dated March ___, 2010 [(this is the settlement agreement document dated April 7, 2010)]. At the conclusion of this agreement the Loan shall be refinanced to include any deficiency from the sale of the other properties. This must be accomplished no later than March 1, 2011. Borrower shall comply with this agreement in the following manner:

a. By paying to Lender the sum of $5,000.00, in certified funds, no later than March 15, 2010; this payment is to be applied to the arrearage;

b. By paying to Lender the sum of $1,500.00, in certified funds, due the first day of each month beginning April 1, 2010, and ending March 1, 2011.

c. On March 1, 2011 the balance of the loan will become immediately due and payable, should Borrower and Lender fail to enter a separate agreement by that date to cure the arrearage or pay off this loan. The balance of the loan will include the capitalization of all accrued interest on the principal, fees, and other amounts as they become due during the course of this Agreement because the payments specified hereunder are not designed to cure the arrearage.

d. If this is an escrowed loan, the regular monthly payment amount may change during the term of this agreement. If so, the Borrower will be required to pay the new regular monthly payment amount in addition to the monthly payment amount designed to cure the arrearage.

e. By paying to lender any additional default and/or foreclosure costs which may be incurred by Lender during the course of this Agreement.

4. Borrower's Payment of Payments Coming Due. Commencing with the regular payment due (next regular payment date), Borrower shall make all future Payments as they become due, which Payments may change in accordance with the terms of the Notes and Mortgage.

5. Events of Default. If Borrower fails to make any of the payments of the Arrears as specified herein on the due date hereof; if the Borrower fails to make any of the Payments pursuant to the terms of the Notes and Mortgage; of [sic] if the Borrower fails to keep a promise or agreement or perform or discharge any agreement, covenant, obligation or undertaking created or agreed to by Borrower in the Loan Documents and this Agreement, same shall constitute an event of

default ("Event of Default") hereunder and under the Loan Documents.

6. Lender's Rights and Remedies Upon Events of Default. Upon and after the occurrence of an Event of Default all amounts then remaining unpaid under the Loan Documents and this Agreement shall be immediately due and payable and Lender shall be free to exercise any or all rights and remedies provided for under the Loan Documents, including, but not limited to, continuance of the foreclosure action, which rights and remedies are incorporated herein by reference as if fully set forth herein. By entering into this Agreement, Lender shall in no way be considered to have waived or have been estopped from exercising any or all of its rights and remedies under the Loan Documents. Noting [sic] contained herein shall constitute a waiver of any or all of the Lender's rights or remedies including the right to proceed with the foreclosure action. This Agreement shall not be construed as a discontinuance of the foreclosure action and any forbearance by the Lender and acceptance of monies hereunder shall not be deemed an estoppel, prejudice or waiver of Lender's right to proceed with the foreeclosure action.

It is also agreed that the Lender, may without further notice to the Borrower, proceed ex parte with all further proceedings in the foreclosure action, inclusive of the order of reference, appointment of a referee, preparing a referee's oath and report and entering final judgment of foreclosure and sale, except that the Lender agrees to forbear in scheduling the foreclosure sale as long as an Event of Default does not exist. . . .

. . .

13. Reinstatement. In the event Borrower cures the Arrears by making all payments required under paragraphs [sic] 3, is current with the Payments then due, and no Event of Default exists under the Loan Documents and this Agreement, Lender shall reinstate the Notes and Mortgage according to its original terms and conditions.

(R. pp. _____; Exh. D to Affidavit of Davies.)

Brooks made all the payments provided for under paragraph 3 of the forbearance agreement. (R. pp. _____; Affidavit of Brooks.) In fact, he made more. (R. pp. _____; Affidavit of Brooks.) Though March 1, 2011, came and went, Brooks continued to make monthly payments in the same amount called for under the forbearance agreement, and First Citizens accepted the continuing payments without complaint. (R. pp. _____; Affidavit of Brooks.) He fell moderately behind on those payments and sought to catch them up, but First Citizens refused to allow him to do that. (R. pp. _____; Affidavit of Brooks & attachments thereto.) First Citizens then made a summary judgment motion on the basis of an affidavit[2] that makes the vaguely worded statement that "Brooks has failed to comply with the provisions of the Settlement Agreement" – not the forbearance agreement – and intimates, but does not state, that Brooks has defaulted the settlement agreement by failing to withdraw his answer in this case. (R. pp. _____; Affidavit of Davies p. 3.) This is despite the fact that the forbearance agreement document states that "[Brooks] hereby withdraws its [sic] answer and defenses with prejudice." (R. pp. _____; Affidavit of Davies Exh. D.)

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). That standard is that "summary judgment may be rendered only when the pleadings, depositions, answers

[2] The master's order states that First Citizens submitted a "counter-Affidavit of a business records custodian"; however, Brooks' counsel never received any such affidavit. (R. p. ___; Order p. 2.) For that matter, Brooks' counsel was never provided with the purported affidavit of attorney's fees and costs First Citizens' counsel stated he was ready to submit. (R. p. ___; Order p. 2.)

to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). If "the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (S.C. 2008).

"When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues." Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. Hancock v. Mid-South Management Co., Inc., 381, S.C. 326, 330, 673 S.E.2d 801, 802-3 (S.C. 2009). In Hancock, the Court held that "in cases applying the preponderance of the

evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Id. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. Id. Accordingly, when the ordinary burden of proof is applicable, only a scintilla of evidence is required to withstand summary judgment. Id.

The factual statements in an affidavit offered in support of summary judgment must be specific; a court will not consider an affiant's conclusory averments in conjunction with summary judgment proceedings. Dawkins v. Fields, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003); Cox & Floyd Grading, Inc. v. Kajima Construction Services, Inc., 356 S.C. 512, 516-17, 589 S.E.2d 789 (Ct. App. 2003). It is only "*when a motion for summary judgment is made and supported as provided in [Rule 56]*" that the non-movant is required to meet the motion with factual material that shows there is a genuine issue for trial. Rule 56(e), SCRCP (emphasis added).

ARGUMENT

I. The lower court erred in making a factual finding that "the forbearance agreement also provided for ongoing payment of the monthly payments due under the Note and Line of Credit[,]" in addition to the payments called for under the language of the forbearance agreement, where ambiguity in the document (particularly when coupled with the parties' course of dealing) created an issue of material fact on that point.

"A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation. It is a question of law for the court whether the language of a contract is ambiguous. Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties.

The determination of the parties' intent is then a question of fact." S.C. Dept. of Natural Resources v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001) (internal citations omitted).

It is well settled that ambiguous language in a contract document should be interpreted strongly in favor of the party who did not draft the document and against the party who did. E.g., So. Atlantic Financial Servs., Inc. v. Middleton, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003); Mid-Continent Refrigerator Co. v. Way, 263 S.C. 101, 109, 208 S.E.2d 31, 35 (1974). Any conflict between clauses in a contract must be resolved in favor of the non-drafting party. Mid-Continent Refrigerator, 263 S.C. at 109.

"The conduct of the parties is entitled to great weight in interpreting an ambiguous contract." Langston v. Niles, 265 S.C. 445, 458, 219 S.E.2d 829, 834 (1975). In cases of doubt, the interpretation of a contract that the evidence shows was shared by both parties to it is determinative. Kitchens v. Lee, 221 S.C. 59, 66, 69 S.E.2d 67, 69 (1952). "Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence." Stackhouse v. Pure Oil Co., 176 S.C. 318, 337, 180 S.E. 188, 196 (1935). The behavior of the parties to the contract in carrying it out is evidence that may speak to their mutual interpretation of the contract terms. Langston, 265 S.C. at 458 (in interpreting ambiguous terms, noting behavior of parties after agreement struck); Kitchens, 221 S.C. at 66 ("[t]he repeated payments by appellant and long-continued and unqualified acceptances by respondent are conclusive of their respective interpretations of the

terms of the contract, by which both are bound even if there were uncertainty as to the terms of the contract").

Here, the terms of the documents at issue show marked ambiguity about what payments Brooks was required to make under his settlement with First Citizens. First Citizens argued that Brooks "is in default of the note, mortgage, and forbearance agreement[,]" and the lower court found that, in addition to the forbearance payments of the initial $5,000.00 and the $1,500.00 monthly payments – which Brooks made – "[t]he forbearance agreement also provided for ongoing payment of the monthly payments due under the Note and Line of Credit proper[.]" (R. pp. _____; Order pp. 2, 5.) Paragraph 3 of the forbearance agreement, however, states that "Borrower shall comply with this agreement *in the following manner*" (emphasis added) and then lists five sub-items, one of which does not call for Brooks to do anything (item (c)), one of which does not apply at all (item (d), since this is not an escrowed loan), and one of which does not apply in the situation of this case (item (e)), since no evidence was presented that First Citizens incurred "any additional default and/or foreclosure costs . . . during the course of this Agreement." (R. pp. _____; Affidavit of Davies Exh. D.) The only actually applicable obligations from this list of what Brooks is required to do to "comply with this agreement" are to pay the initial $5,000.00 payment and pay the $1,500.00 monthly payments through March 1, 2011. (R. pp. _____; Affidavit of Davies Exh. D.) To the extent that there are provisions in the forbearance agreement that purport to require Brooks to make these payments *and* other payments under the note and mortgage, the controlling language is in Paragraph 3, which states Brooks is required to do only the things specifically enumerated in the list set out there in order

to "comply with this agreement." (R. pp. _____; Affidavit of Davies Exh. D.) "It is, of course, elementary that any conflict between [Paragraph 3] and any other provision of the contract documents would have to be resolved or construed in favor of [Brooks,]" the non-drafting party. Mid-Continent Refrigerator, 263 S.C. at 109.

Further, the parties' course of performance of the settlement bears out that First Citizens and Brooks both construed the forbearance agreement as obligating Brooks to pay only the $5,000.00 initial payment and $1,500.00 monthly payments. Those are the payments Brooks made, and First Citizens accepted them without complaint. (R. pp. _____; Affidavit of Brooks.) This is evidence that speaks to a shared interpretation of the contract terms by Brooks and First Citizens. Langston, 265 S.C. at 458; Kitchens, 221 S.C. at 66. Indeed, when First Citizens moved for summary judgment, the supporting affidavit it used did not state that Brooks was in default of the forbearance agreement for failure to make required payments. (R. pp. _____; Affidavit of Davies.)

This is an ambiguity that the law required the master to construe in favor of Brooks, the non-drafting party. By finding that "the forbearance agreement also provided for ongoing payment of the monthly payments due under the Note and Line of Credit[,]" the master construed the ambiguity in favor of First Citizens, the drafting party. (R. pp. _____; Order p. 5.) This was error. At the very least, there was a genuine issue of material fact regarding the construction of the forbearance agreement's terms in this regard.

II. The lower court erred in making a factual finding that "[t]he forbearance agreement contained a term that stated that acceptance of monies under the agreement was not an estoppel, prejudice or waiver of Plaintiff's right to proceed with the foreclosure action"

without also making findings as to other language in the documents at issue that makes that term ambiguous.

The forbearance agreement does contain a term that states that "acceptance of monies hereunder shall not be deemed an estoppel, prejudice or waiver of Lender's right to proceed with the foreclosure action." (R. pp. _____; Affidavit of Davies Exh. D.) The forbearance agreement also contains other, inconsistent terms, however. Paragraph 1 of the document states that "Lender shall forbear from exercising any and all of its rights and remedies presently existing or arising during the term of this Agreement under the Loan Documents, the ongoing foreclosure action or this Agreement, provided that there exists no Event of Default[.]" (R. pp. _____; Affidavit of Davies Exh. D.)

This, too, is an ambiguity that the law required the master to construe in favor of Brooks. So. Atlantic Financial, 356 S.C. at 447; Mid-Continent Refrigerator, 263 S.C. at 109. The master's finding that the forbearance agreement contained this term, without any findings about its ambiguity and inconsistency, was at best incomplete. (R. pp. _____; Order p. 5.) This was error.

III. The lower court erred in making a factual finding that "the Defendant breached the terms of the forbearance agreement by failing to withdraw his Answer in this matter" when the record showed at least an issue of fact about that and, in any event, the matters in dispute arose well after the answer was served.

The master found "the Defendant breached the terms of the forbearance agreement by failing to withdraw his Answer in this matter but in any event, the Answer has not been withdrawn." (R. pp. _____; Order p. 5.) This is the only basis even arguably articulated in Mr. Davies' affidavit for Brooks' purported default of the settlement agreement. (R. pp. _____; Affidavit of Davies.)

The forbearance agreement document, however, states that Brooks "hereby withdraws its [sic] answer and defenses with prejudice[.]" (R. pp. _____; Affidavit of Davies Exh. D p. 2.) Viewed in the light most favorable to Brooks, Davies' intimation that Brooks breached the settlement agreement by failing to withdraw his answer was false.

That the forbearance agreement provides that Brooks withdrew his answer by entering into that agreement does not, however, preclude Brooks from contesting the Plaintiff's motion for summary judgment or any further proceedings; at most, it precludes him from contesting such proceedings on the basis of defenses articulated in Brooks' answer. (R. pp. _____; Affidavit of Davies Exh. D p. 2.) Here, the matters in dispute with regard to the summary judgment motion all arose well after Brooks answered in the case and concern the effect of the parties' actions in performing the settlement agreement. Our courts do not penalize litigants for failing to raise a defense in an answer where the facts giving rise to the defense do not come into existence until after the answer is given. LaRosa v. Johnston, 328 S.C. 293, 297, 493 S.E.2d 100, 102 (Ct. App. 1997) (where "Johnston acquired a statutory defense that had not previously been available" Court of Appeals declined "to penalize Johnston for failing to raise a defense which she could not have raised" earlier); Wagner v. Wagner, 286 S.C. 489, 491-92 335 S.E.2d 246, 247-48 (Ct. App. 1985) (permissible for litigant to raise unpled defense where facts supporting defense were not in existence at the time she answered).

In any event, it was error for the master to find that "the Defendant breached the terms of the forbearance agreement by failing to withdraw his Answer in this

matter but in any event, the Answer has not been withdrawn." (R. pp. _____; Order p. 5.) At the very least, there was a genuine issue of material fact on that point. Given that a scintilla of evidence on an issue of material fact is all that is required to avoid summary judgment, this was error by the master and, along with the other errors in the order below, requires reversal.

CONCLUSION

The lower court erred in making the findings subject of this appeal. The Court should reverse the master's grant of partial summary judgment as to those findings, so that the disposition of these factual issues is made at trial.

Respectfully submitted,

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May 8, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Richard L. Booth, Master-in-Equity

Common Pleas Case No. 2009-CP-43-2538
Appellate Case No. 2013-000255

First Citizens Bank and Trust Company, Inc.,.....Respondent,

v.

Charles T. Brooks, III and the South Carolina Department of Revenue, Defendants,

Of Whom Charles T. Brooks, III, is.....Appellant.

PROOF OF SERVICE

I certify that I served the foregoing initial brief of Appellant on the Respondent by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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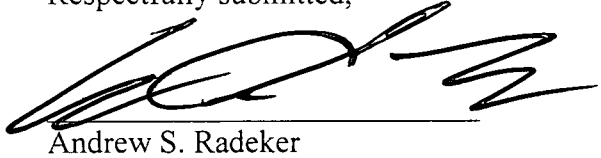
May 8, 2013

Respectfully submitted,



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