

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
SAVANNAH RIVER BANKING
COMPANY,

Plaintiff,

v.

KIMBERLY I. LEWIS, THE U.S.
SMALL BUSINESS
ADMINISTRATION, an Agency of the
UNITED STATES OF AMERICA,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

C/A NO.: 2012-CP-02-2329

**ORDER GRANTING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

4.4.13
~~_____~~
Anita Knoepfle 12/15
Deputy Clerk

Before the Court in the above-referenced matter is the motion for summary judgment of Plaintiff Savannah River Banking Company ("Savannah River"). A hearing on the motion was held on February 19, 2013, at which time oral argument was presented from Savannah River, through its counsel Paul Simons, Jr., and from Defendant Kimberly I. Lewis, *pro se*. Defendant The U.S. Small Business Administration ("Defendant SBA") failed to attend the hearing and failed to make any objections. For good cause shown, Plaintiff's Motion for Summary Judgment is hereby GRANTED.

FINDINGS OF FACT

1. The Lis Pendens was filed on September 18, 2012.
2. The Summons and Complaint were filed on September 18, 2012.
3. Service was made upon the Defendants named herein as shown by the affidavits and certificates of service filed with the Court.
4. All parties were notified of the time, date, and place of the hearing in this matter.

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5. The Property (as defined below) is located in Aiken County, South Carolina.
6. On or about June 24, 2009, for value received, Defendant Kimberly I. Lewis ("Borrower" or "Defendant Lewis"), executed and delivered to Savannah River, a certain Promissory Note ("Note") dated June 24, 2009, in the original principal amount of \$115,000.00. According to the terms and conditions set forth in the Note, Borrower promised to pay to the order of Savannah River the sum of \$115,000.00, together with interest thereon per terms as set out in the Note.
7. The original Note and Mortgage in favor of Savannah River is on file with the Court.
8. In order to secure the payment of the Note and other indebtedness, Borrower did execute and deliver to Savannah River a Mortgage ("Mortgage") dated June 24, 2009, and recorded with the Aiken County R.O.D./R.M.C. Office on June 25, 2009, in Book RB 4263, at page 2039. The Mortgage covers the real and personal property ("Property") described in the Mortgage. The Mortgage was duly recorded in the records as set forth above.
9. The Mortgage constitutes a first priority mortgage against the Property.
10. Pursuant to the terms of the Note and Mortgage, the Property also secures any sums paid by Savannah River for inspecting and securing the Property, for fire and hazard insurance, taxes and assessments for the Property, and all costs of collection, including attorney's fees and costs.
11. Any and all notices which may have been required have been provided.
12. The monthly payments due on the Note and Mortgage are in default since at least April 15, 2012, and the conditions of the Note and Mortgage have been breached although demand for payment thereof has been made.

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13. Savannah River is the owner and holder of the Note and Mortgage, and after providing all required notices, elected to declare the entire balance of said indebtedness due and payable.

14. Payment under the Note has not been made and Savannah River elected to require immediate payment of the entire amount due thereon and placed the Note and Mortgage in the hands of the attorneys of record herein for collection by foreclosure.

15. There is due on the Note and Mortgage, with interest at 7.0% as provided in the Note, and other costs and expenses of the within action, are as follows:

Principal	\$107,791.77
Interest (as of February 19, 2013)	\$6,807.06
Late Charges	\$500.00
Attorney' Fees and Costs	<u>\$10,954.50</u>
Total Debt (as of February 19, 2013)	<u>\$126,053.33</u>

16. Interest after February 19, 2013 accrues at the rate of 7.0% (pursuant to the terms of the Note and Mortgage) on the Total Debt and other charges from and after said date per terms as set out in the Note and also for further costs and disbursements of this action, including attorney's fees and costs.

17. The Note is governed by South Carolina law, and provides that Borrower agrees "to pay all expenses of collection, enforcement or protection of [Savannah River's] rights and remedies under [the Note] or any other [document relating to the loan to Defendant Lewis from Savannah River]."

18. Savannah River is seeking the usual foreclosure of the Mortgage and has specifically demanded, personal judgment against Borrower, pursuant to Section 29-3-660 of the *South Carolina*

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Code of Laws (1976), as amended, for any deficiency in this action remaining after the sale of the Property.

19. Defendant SBA has an interest in the Property.

CONCLUSIONS OF LAW

1. Summary judgment is appropriate if the pleadings, depositions, answers 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. Rule 56(c), S.C. R. C. P.; Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005).

2. In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004). If triable issues exist, those issues must go to the jury. Mulherin-Howell v. Cobb, 362 S.C. 588, 595, 608 S.E.2d 587, 591 (Ct. App. 2005). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

3. "To recover for a breach of contract, the plaintiff must prove: (1) a binding contract entered into by the parties; (2) a breach or unjustifiable failure to perform the contract; and (3) damage suffered by the plaintiff as a direct and proximate result of the breach." Tomlinson v. Mixon, 367 S.C. 467, 479-480 (S.C. Ct. App. 2006). "A party's contractual duty is found in the obligation assumed by the party to the contract." *Id.*

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4. "Basic contract law provides that when a contract is clear and unambiguous, the language alone determines the contract's force and effect." Lewis v. Premium Inv. Corp., 351 S.C. 167, 171 (S.C. 2002).

5. Defendant Lewis contends this Court is without jurisdiction to hear this matter. I find that jurisdiction and venue are proper in this matter. See Greenwood Loan & Guar. Ass'n. v. Williams, 71 S.C. 421 (1905).

6. It is well-established law that physical possession of a negotiable promissory note endorsed to the holder is prima facie evidence of ownership. See Federal Intermediate Credit Bank v. Carolina Petroleum Co., 154 S.C. 435 (1930).

7. I find Defendant Lewis has failed to present any evidence that demonstrates the existence of a genuine issue as to any material fact. In the present case, Savannah River submitted an affidavit and documentation demonstrating that it was the owner and holder of the Note and Mortgage and that Defendant Lewis had defaulted under the terms of the Note. Savannah River had filed the original Note and Mortgage with the Court on January 7, 2013. Defendant Lewis filed no counteraffidavit or documentary evidence to contradict Savannah River's evidence or to support any potential defense to the action. I find the original Note and Mortgage on file with the Court is prima facie evidence that Savannah River is the owner and holder of the Note and Mortgage.

8. Defendant Lewis asserted that summary judgment is premature stating she had not had adequate time to develop evidence that Savannah River is not the owner and holder of the Note and Mortgage at issue in this case. Defendant Lewis offered speculation that the Note and Mortgage had been pooled, securitized, and sold to another financial institution. She asserted additional time should be granted so that auditors may inquire as to whether this loan has been pooled, securitized, and sold to another financial institution.

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9. South Carolina law requires the non-movant in a motion for summary judgment be given adequate opportunity to develop evidence that could defeat a summary judgment motion.

10. I find Defendant Lewis already had the benefit of documentation provided through discovery and that Defendant Lewis had been provided adequate time to uncover evidence that Savannah River was not the owner and holder of the Note and Mortgage.

11. I find Defendant Lewis is in default of the Note and Mortgage.

12. The Courts of South Carolina enforce contracts according to their terms. Lewis v. Premium Inv. Corp., 351 S.C. 167, 171 (S.C. 2002). Under the terms of the Note and Mortgage, the Plaintiff is entitled to and should have a judgment of foreclosure of the Mortgage and the Property should be ordered sold at public auction after due advertisement. Plaintiff should have judgment of foreclosure of the Mortgage and the Property should be ordered sold at public auction after due advertisement.

13. I find Savannah River is entitled to an award of attorney's fees and expenses in the amount of \$10,954.50.

14. Plaintiff should have immediate judgment against Defendant Lewis for the amount set forth in paragraph 16 above in accordance with S.C. Code Ann. §29-3-650 (1976). Upon sale of the Property, the Master in Equity shall credit upon this judgment the amount paid to Plaintiff as a result of said sale.

15. I find Defendant SBA has an interest in the Property, but its claims are junior and subordinate to the lien of Savannah River's Mortgage since they were filed after the Savannah River's mortgage was recorded. See S.C. Code Ann. § 30-7-10 (indicating South Carolina's recording act is a race-notice act). In the event there is a surplus from the sale of the Property,

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Defendant SBA may present any such claim at a hearing subsequent to the sale, in accordance with Rule 71(c) S.C.R.C.P.

16. The Court notes the Property is commercial, and the Home Affordable Modification Program is not applicable to this action.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

(1) Savannah River is entitled to Summary Judgment on its claims for breach of the Note and foreclosure of the Mortgage.

(2) There is due to Savannah River on the Note and Mortgage as of February 19, 2013, the sum of \$126,053.33, as set out in Findings of Fact above.

(3) In addition to the amount due in the preceding paragraph, there is due to Savannah River (i) subsequent costs of collection, if any, (ii) any other necessary and reasonable costs and expenses or advance allowed under the Note and/or Mortgage which may be incurred by Savannah River after the date of this Order, including, but not limited to, the fees and expenses in connection with the sale of the Property, and (iii) interest after February 19, 2013, which shall accrue at the rate of 7.00% per annum.

(4) Judgment is hereby entered against Defendant Lewis in the amount of \$126,053.33.

(5) Defendant Lewis shall, on or before the date of sale of the Property, pay to Savannah River, or its attorney, the amount of Savannah River's debt as aforesaid, together with the costs and disbursements of this action.

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(6) On default of payment before the scheduled sale date, the Property shall be sold by Aiken County Master in Equity, to whom this matter is being referred, at public auction, at the Aiken County Courthouse at such date and time ordered by the Master in Equity on the following terms:

(a) For cash: The Master in Equity will require a deposit of 5% on the amount of the bid in cash or equivalent (unless Savannah River is the successful bidder) the same to be applied to the purchase price upon compliance with the bid. In case of non-compliance within the time specified in the Notice of Sale, the deposit will be forfeited and applied to the costs and Savannah River's debt.

(b) Interest on the balance of the bid shall be paid to the day of compliance at the rate of 7.0% per annum.

(c) The sale shall be subject to Defendant SBA's one-year right of redemption, taxes and assessments, existing easements and restrictions and easements and restrictions of record, and any other senior encumbrances.

(d) The Purchaser shall pay for the deed preparation and costs of recording the Deed and Deed Stamps.

(7) Upon sale of the Property, the Master in Equity shall credit upon this judgment the amount paid to Savannah River as a result of said sale. The Clerk of Court for Aiken County is hereby directed to enter and docket this judgment in the same manner as other judgments.

(8) If Plaintiff is the successful bidder at the sale for a sum not exceeding the amount of costs, expenses and the indebtedness due Plaintiff, Plaintiff may pay to the Master in Equity only the amount of the costs and expenses, crediting the balance of the bid on Savannah River's indebtedness.

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(9) A personal or deficiency judgment having been demanded, the bidding will remain open for thirty days after the date of sale, with the sale to be final upon that date.

(10) The Master in Equity will, by advertisement according to law, give notice of the date, time, and place of such sale, and the terms thereof, and will execute to the purchaser, or purchasers, a deed to the premises sold. Plaintiff, or any other party to this action, may become a purchaser at such sale. If the purchaser or purchasers at the sale should fail to comply with the terms thereof, then the Master in Equity may advertise the said premises for resale on the next, or some other subsequent sales day, at the risk of the highest bidder, and so from time to time thereafter until a full compliance shall be secured.

(11) On default of payment at or before the sale of the Property, the Property shall be sold under the direction of the Master-in-Equity for Aiken County, South Carolina, the equity of redemption be barred, and the proceeds of sale shall be applied as follows:

First, to the costs and expenses of the within action and sale.

Second, to the payment and discharge of the amount due on Savannah River's Note and Mortgage, together with attorney's fees as aforesaid, and

Third, the surplus, if any, be distributed according to law.

(12) That Savannah River have personal judgment against Defendant Lewis, pursuant to Section 29-3-660 of the *South Carolina Code of Laws* (1976), as amended, for the deficiency in this action remaining after the sale of the Property unless such deficiency is waived prior to the sale of the Property.

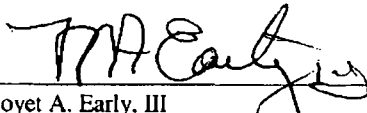
(13) Attached hereto as Exhibit "A" is a description of the Property to be sold.

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(14) In the event the successful bidder is other than the Defendant in possession herein, the Sheriff, upon receipt of a Writ of Assistance or other order of ejectment, is authorized and directed to eject and remove from the Property the occupant(s) of the property sold, together with all personal property located thereon, and put the successful bidder or his assigns in full, quiet and peaceable possession of said Property without delay, and to keep said successful bidder or his assigns in such peaceable possession.

(15) Defendant Lewis, and all persons whosoever claiming under Defendant Lewis, be forever barred and foreclosed of all right, title, interest, and equity of redemption in the said Property so sold, or any part thereof.

SO ORDERED this 27th day of March, 2013.


Doyet A. Early, III
Judge of Court of Common Pleas

Bamberg, South Carolina

Exhibit "A"

All that certain piece, parcel, or tract of land, with any improvements thereon, situate, lying, and being located on the corner of Richland Avenue (US Route No. 1 & 78) and Orangeburg Street, (S-2-625) in the City of Aiken, in Aiken County, State of South Carolina, being shown and designated as Tract A (0.69 acre), upon a survey thereof made for Ronald D. Lewellyn by Tripp Land Surveying, Inc., RLS, under date of November 15, 2005 with several revisions, the last revision on August 28, 2006 and recorded in Record Book PL 52, Page 110, records of Aiken County, South Carolina. Reference being hereby made to aforementioned plat for a more complete and accurate description as to metes, boundaries, and location of subject property.

Said property is known under the current numbering system of Aiken County, South Carolina, as 1028 Richland Avenue East, Aiken, South Carolina 29801.

Tax Parcel Number: 121-07-10-001

[Handwritten signature]
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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP0202329

Savannah River Banking Company	Kimberly I Lewis	U S Small Business Administration United States of America
PLAINTIFF(S)		DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk:
