

**IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes, III, Master in Equity**

Case No: 2010-CP-07-03033

Beach First National Bank,..... Respondent

v.

**Estate of Margaret Gurnham,..... Appellant,
a/k/a Margaret D. Hover and /or Brian Hover, Its Personal Representative**

REPLY BRIEF OF APPELLANT

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STATEMENT OF FACTS

Appellant adopts its statement of facts set forth in its initial brief filed in this matter on June 15, 2012. [Appellant's Initial Brief pp. 2-3]

ARGUMENT

Respondent does not argue that it complied with the mandatory provisions of South Carolina Code Section 62-3-803; rather, the Bank claims that its judgment, presented outside of the mandatory claims period, should be nonetheless allowed. For the reasons set forth in Appellant's Initial Brief, as well as those set forth below, the Bank's position, which runs afoul of the intent of the Probate Code itself, should be rejected.

I. Respondent failed to present its claim against the Estate within the statutory time period and it should therefore be rejected.

There is no South Carolina case which addresses the precise issues raised in this appeal. In the absence of controlling authorities, we must look to other jurisdictions for guidance. The matters at issue on this appeal have been addressed by other courts which have favored the argument(s) advanced by Appellant. The case of Harter v. Lenmark, 443 N.W.2d 537 (1989) is informative. In Harter, the Appellant obtained a deficiency judgment against the Respondent-Estate in a mortgage foreclosure action. On appeal, the Minnesota Supreme Court was asked to determine whether such a judgment, obtained outside of the mandatory claims period articulated by an almost identical statute as ours, *Compare* Minn.Stat. Sec. 524.3-803(a)(1) (1988), S.C.Code Section 62-3-803, is valid and enforceable against the Estate. The Court held that it was not. In doing so, it stated the following:

Harter's trustee alternatively contends that no claim was required because section 524.3-803 specifically excepts mortgage enforcement proceedings from claim presentation requirements. While we agree that, by operation of statute, a mortgagee may proceed against property of the estate encumbered by a mortgage without the necessity of filing a claim, **there is no statutory provision authorizing the entry of a deficiency judgment on a debt in the absence of the requisite claim. This noteholder is seeking a deficiency judgment by virtue of a debt evidenced by a promissory note, an instrument not within the purview of section 524.3-803(c)(1), and the failure to file a claim is dispositive.** We therefore reverse the portion of the decision imposing liability upon the estate of Catherine Lenmark and vacate that portion of the judgment. (Emphasis added).

The Harter case, like this one, simply illustrates the straight-forward principle that the claims barring statute means what it says: that any claim, regardless of its form, is barred if not presented in a timely fashion.

Likewise, a similar matter was addressed by the Mississippi Appellate Court in Gandy v. Citicorp., 985 So.2d 371 (Miss. App. 2008). In Gandy, the appellate court confirmed the ability of a secured creditor to enforce its claim against the securing property without the necessity of filing a claim against the estate. However, it ratified the universal proposition that a deficiency judgment against an estate may not lie without the requisite filing of a claim in the probate court against the estate. The Court held as follows:

Citicorp cites Mississippi Code Annotated section 91-7-167 (Rev.2004) for support. Section 91-7-167 provides that a creditor shall not be deprived of "his right to enforce the lien against the property by a failure to present his claim and have it probated and registered[.]" *Id.* However, failure to probate and register the claim precludes the creditor from a claim for any deficiency from the assets of the estate. *Id.* This proposition was laid out in Riegelhaupt v. Ostroffsky, 237 Miss. 521, 529-30, 115 So.2d 331, 334-35 (1959). The Supreme Court stated:

As between the bank and the appellants the bank had the right to elect to stand on its security and not probate its claim against the estate. The result of this action would have been that if the real estate on which the bank held security

had not been sufficient to satisfy the claim, the bank could not have looked to the other assets of the estate for the collection of any deficit that there may have been as a result of a foreclosure of the deed of trust, if any.

Respondent could have preserved its claim against the Estate had it simply presented a claim within the proscribed time period. Alternatively, it could have filed its action in the court of common pleas against the personal representative in a timely fashion. See S.C.Code Section 62-2-804(2) ("The claimant may commence a proceeding against the personal representative in any court * * * but the commencement of the proceeding must occur within the time limited for presenting the claim * * *").

In this case, Respondent failed to timely present its claim to the personal representative and also failed to commence any timely action against the estate in the court of common pleas. Accordingly, the clear and unambiguous law of this state mandates the relief sought by the Appellant.

CONCLUSION

For all of the foregoing reasons, because the Bank failed to timely present its claim against the Estate, the Estate, not the Bank, should have been granted summary judgment. This Court should so hold.

Respectfully Submitted,



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October 4, 2012

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Case No: 2010-CP-07-03033

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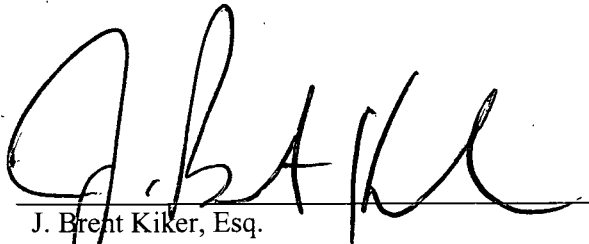
v.

Estate of Margaret Gurnham,..... Appellant.
a/k/a Margaret D. Hover and /or Brian Hover, Its Personal Representative

PROOF OF SERVICE

I certify that I have served the Appellant's Reply Brief on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on October 4, 2012 addressed to its attorneys of record Wm. Weston Newton, Post Office Box 1938, Bluffton, South Carolina 29910 and James B. Richardson, Jr., 1229 Lincoln Street, Columbia, South Carolina 29201.

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SC Court of Appeals

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**Re: Beach First National Bank v. The Estate of Margaret Gurnham
a/k/a Margaret Hover and or Brian Hover, Its Personal
Representative
2010-CP-07-03033**

Dear Wes and Jim:

Enclosed please find the Appellant's Reply Brief and Proof of Service for the same in the above-referenced matter.

With kind regards, I am.

Sincerely,

IKER LAW FIRM, P.A.


J. Brent Kiker

JBK:ksk

Enclosures

Cc: Richard Allen, Esquire

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SC Court of Appeals

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October 4, 2012

Honorable Kenneth A. Richstad
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
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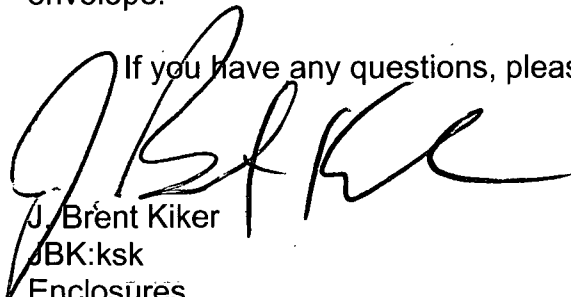
**Re: Beach First National Bank v. The Estate of Margaret Gurnham
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Dear Mr. Richstad:

Enclosed for filing is the Appellant's Reply Brief and Proof of Service for the same.

Please return a clocked copy to me in the enclosed self addressed envelope.

If you have any questions, please contact me at your convenience.



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JBK:ksk
Enclosures

cc: Richard Allen, Esquire
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