

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

First Citizens Bank and Trust Company)
 n/k/a First Citizens Bank and Trust)
 Company, Inc.,)

Plaintiff,)

vs.)

Annette Peksa, individually and heir of)
 Nancy M. Cody, Robert Mark Moore,)
 Individually and as heir of Nancy Cody,)
 Micheal Ray Moore, individually and as)
 heir of Nancy Cody, also)
 All other person unknown, claiming)
 Any right, title, estate, interest in or)
 Lien upon the Real Estate described)
 Herein. Chase E. Furnas & Co., and)
 State of South Carolina Department of)
 Revenue,)

Defendants.)

FORECLOSURE DECREE
(Deficiency Waived)
Non-Jury Proceeding
C.A. No.: 2008-CP-42-5475

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2009 OCT 26 AM 11:34
 MARC KITCHENS

Pursuant to Rule 53 of the South Carolina Rules of Civil Procedure, the above-entitled foreclosure action was referred to me for the purpose of conducting a hearing on the same, taking testimony, determining all issues of fact and law, and entering a final judgment thereon.

A hearing was conducted before me and testimony was taken in the above-captioned case on October 26, 2009. Plaintiff was represented by the law firm of Roe Cassidy Coates & Price, P.A., James H. Cassidy, appearing. South Carolina Department of Revenue timely filed an Answer by and through Office of General Counsel. Joseph K. Maddox, Jr. as Guardian *ad Litem Nisi* appeared on behalf of all persons unknown,

claiming an right, title, estate, interest in or lien upon the real property which is the subject matter of this action. No appearances were made for the Defendants. From the records and from the testimony and evidence introduced, I make the following findings of fact and conclusions of law:

FINDINGS OF FACT:

1. The original Lis Pendens was filed on September 8, 2008, an Amended and Refiled Lis Pendens was filed on October 20, 2008, and a Third Amended and Refiled Lis Pendens was filed on March 10, 2009 in the Office of the Clerk of Court for Spartanburg County.
2. The Second Amended Summons and Foreclosure Complaint were filed on March 10, 2009, in the Office of the Clerk of Court for Spartanburg County.
3. Defendants have been properly served with, or accepted service of, the Third Amended Lis Pendens, Summons, and Complaint.
4. Defendants, Nancy M. Cody, Robert Mark Moore, Michael Ray Moore, and Chase E. Furnas & Co. are in default as shown by Affidavit on file herein.
5. According to Affidavit filed herein, no Defendant in default is actively in the Military Service of the United States of America, as contemplated under the Servicemembers Civil Relief Act, U.S.C.A., Title 50, App. § 501, et seq., and any amendments thereto.
6. This action was brought for the foreclosure of a real estate mortgage, the property covered by the mortgage is in Spartanburg County, and this Court has jurisdiction over all parties and the subject property.

7. All Defendants and/or attorneys of record were notified of the date, time, and place of the hearing in this matter and were provided with a copy of the Order of Reference.

8. I find that the Loan, Note, and Mortgage giving rise to this foreclosure action is a commercial transaction and is not subject to modification under the HMP and that the Temporary Restraining Order issued by the Supreme Court is not applicable.

9. For value received, Nancy M. Cody (hereinafter "Debtor") executed and delivered a promissory note (hereinafter "Note") to Plaintiff dated May 8, 2003, containing a promise to pay the principal sum of Forty Eight Thousand Seven Hundred Thirteen and 08/100 Dollars (\$48,41.08), with interest thereon and repayment terms as specified therein.

10. In order to secure the payment of said Note, and all renewals, extensions, substitutions, and/or modifications thereof, and/or any future advances, Debtor executed and delivered to Plaintiff a mortgage (hereinafter "Mortgage") of even date and identical amount, whereby there was conveyed unto Plaintiff by way of said Mortgage the property described as follows:

Property: 2328 W. Croft Circle, Spartanburg, SC 29302, and further described as:

All that certain piece, parcel or lot of land situate, lying and being in the State of South Carolina, County of Spartanburg, commonly known as 2328 West Croft Circle, Spartanburg, and being more particularly shown and designated as Lot No. 5 of Block A of Unit 10 of Spartanburg County Foundation, as shown on plat recorded in Plat Book 22, Page 108-109, in the Office of the Register of Deeds for Spartanburg County, South Carolina. Property is more recently shown in Plat Book 129, Page 887, said Register of Deeds. Reference is made to said plats for a more detailed description.

This is the same property conveyed to Mortgagor by deed of Cheryl J. Compton filed August 21, 1997 in Deed Book 66-K, Page 130, said Register of Deeds.

11. Said Mortgage was recorded in the ROD Office for Spartanburg County in Mortgage Book 2953 at Page 115 on May 9, 2003. According to the records in the Probate Court for Spartanburg County and information provided to Plaintiff by Annette Peska, Nancy M. Cody ("Debtor"), was a citizen and resident of the County of Spartanburg, State of South Carolina and died intestate on March 2, 2008; the Defendants, Annette Peksa, is the daughter and heir of Debtor, Robert Mark Moore and Michael Ray Moore are sons and heirs of Debtor.

12. Plaintiff is the lawful owner and holder of the Note and Mortgage.

13. The Mortgage constitutes a first lien upon the subject property.

14. The Note and Mortgage provided:

a. that upon the failure by Debtor to pay the debt as specified therein, the holder thereof might, at its option, declare the entire outstanding indebtedness immediately due and payable;

b. for the recovery of such sums advanced as may be necessary to protect the priority of the Mortgage and the property secured thereby; and

c. for attorney's fees of up to 15% of the amount due and costs to be added to the outstanding indebtedness should the Note and Mortgage be placed in the hands of an attorney for collection.

15. Debtor has defaulted in payments, the Note is due and payable in full pursuant to its terms, and Plaintiff has exercised its option to declare the entire outstanding indebtedness immediately due and payable.

16. Plaintiff has placed the Note and Mortgage in the hands of Roe Cassidy Coates & Price, P.A. for collection/foreclosure.

17. Plaintiff is entitled to foreclose the Mortgage.

18. Plaintiff's attorney has assumed responsibility for the institution of this action and has performed an appropriate search of the title on the subject property. Plaintiff's attorney has been responsible for the preparation of the Lis Pendens, Summons and Complaint, Affidavit of Default, Order of Reference, Notice of Hearing, Proposed Final Decree, Notice of Sale, and other documents pertaining to the service and finalization of this action. Additionally, Plaintiff's attorney has arranged for service of process, has scheduled and prepared for the hearing, has provided reinstatement and/or payoff figures if requested, and has had telephone conversations with the Defendant(s) if requested. Future duties of Plaintiff's attorney include forwarding copies of the Decree to Defendant(s), advising the Defendant(s) of the date of sale, arranging and coordinating Plaintiff's bid, representation of Plaintiff at the sale, and preparation of after-sale documentation as required. Anticipated services to be performed do not include exceptional circumstances delaying conclusion beyond the normal time. Additionally, the Note specifically provides for attorney fees of not less than 15% of the principal and interest owing (see The Citizens and Southern National Bank of South Carolina v. Easton, 310 S.C. 458, 460-461, 426 S.E.2d 640 (1993)). In light of the above, the size of the mortgage debt, and Plaintiff's attorney's qualifications, Six Thousand and 00/100 Dollars (\$6,000.00) is a reasonable attorney's fee in this matter. Plaintiff is further entitled to reimbursement of its costs in this matter, which to date total \$1,128.73.

19. The amount due and owing on the Note and secured by the Mortgage, as of the date of the hearing, with interest at the rate provided in the Note (6.250%), and other costs and expenses of collection, exclusive of costs and attorney's fees, with a daily accrual rate of \$7.14 is as follows:

a.	Principal Balance:	\$41,350.88
b.	Interest Due:	\$767.74
c.	Late Charges:	\$0.00
	BALANCE DUE:	\$42,118.62
	Attorney Fees:	\$6,000.00
	Costs to Date:	\$1,128.73
	TOTAL AMOUNT DUE:	\$49,247.35

20. The anticipated balance due and owing by Debtor as of Sales Day, December 7, 2009 shall be Two Hundred Thirty Three Thousand Seven Hundred Ninety Two and 65/100 Dollars (\$42,418.50), with a daily accrual rate of \$7.14.

21. Plaintiff is waiving any deficiency judgment, with the proceeds to be applied towards costs and expenses, attorney's fees, and the mortgage indebtedness.

22. Plaintiff is also seeking payment of Guardian fees in the amount of Two Hundred Fifty and 00/100 Dollars (\$250.00).

23. Defendants set out hereinafter were joined as party defendants by virtue of the fact that said Defendants claim or may claim a lien or other interest in the property which is the subject of this foreclosure action and said lien or claim is subordinate to the first lien of the Plaintiff:

a. Chase E. Furnas & Co. is made a party to this proceeding by way of that judgment against Robert Moore filed December 5, 2008, in the Office of the Spartanburg County Clerk of Court in Judgment Roll Number 2009-CP-42-0436 ;

b. State of South Carolina Department of Revenue is made a party to this proceeding by way of that tax lien against Michael Moore filed February 22, 2006, in the Office of the Spartanburg County Clerk of Court.

CONCLUSIONS OF LAW:

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT:

1. This action is not stayed by the May 4, 2009, order of the Honorable Jean Hoefler Toal, Chief Justice of the South Carolina Supreme Court, in the matter identified as *In Re: Federal National Mortgage Association ("Fannie Mae") Loans Subject to Foreclosure Sale*, or the Administrative Order executed by the Honorable Jean Hoefler Toal, Chief Justice of the South Carolina Supreme Court, in the matter identified as *Re: Mortgage Foreclosures and the Home Affordable Modification Program (HMP)*, on May 22, 2009.

2. Plaintiff mortgage constitutes a first mortgage on the premise without restriction of title and entitled to have judgment of foreclosure of the Mortgage and the mortgaged property should be sold at public auction after due advertisement.

3. As of the date of hearing, there is due to Plaintiff, under the terms of the Note and Mortgage the sum of Forty Two Thousand One Hundred Eighteen and 62/100 Dollars (\$42,118.62), plus attorney's fees of Six Thousand and 00/100 Dollars (\$6,00.00) and all costs and expenses of this action, which to date total One Thousand One Hundred Twenty Eight and 73/100 Dollars (\$1,128.73), with interest on said debt from the date of hearing through the date of compliance at the contract rate (6.250%). I find a Guardian *ad Litem* fee of Five Hundred and no/100 (\$250.00) is reasonable.

4. Plaintiff's Mortgage be foreclosed and any equity of redemption of the named Defendant(s) and all persons who may claim under him, them, or it, be forever barred.

5. The mortgaged premises as described in the Complaint and previously in this Decree be sold at public auction on the next available sales day, or on some subsequent date designated by the Court.

6. The Master in Equity for Spartanburg County, South Carolina, after having duly advertised the mortgaged premises sale according to the law and custom of this Court, shall sell the mortgaged premises described in the Complaint and previously in this Decree to the highest bidder, at public auction at the Spartanburg County Courthouse on the next available sales day, during the usual hours of public sale, on the following terms:

- a. the term of this sale shall be cash;
- b. the purchaser shall pay for deed stamps and costs of recording the deed;
- c. each successful bidder, other than Plaintiff, shall be required to deposit with the Master in Equity at the time the bid is accepted, cash or certified check in the sum of five percent (5%) of the bid as evidence of good faith;
- d. interest shall accrue on the bid at the rate set forth in the Note through the date of compliance;
- e. in the event that the purchaser fails or refuses to comply with the terms of the sale within twenty (20) days of the close of bidding, the deposit shall be forfeited and applied first to the costs, then to Plaintiff's debt, and the Master in Equity shall forthwith advertise and resell the property upon the same terms on some subsequent date, as

designated by the Court, at the risk of the former purchaser, until obtaining full compliance with the terms of the sale;

f. upon the purchaser's compliance with the terms of the sale, the Master in Equity shall execute a good and sufficient deed of conveyance to the premises, and the purchaser shall thereby be entitled to possession of the premises;

g. in the event the purchaser is other than Defendant(s) in possession herein, the Sheriff of Spartanburg County is ordered to remove from the premises the occupants of the property sold, together with all personal property located thereon, and put the purchaser or his/her assigns in full, quiet, and peaceable possession of said premises without delay, and to keep said purchaser or his/her assigns in such peaceable possession;

h. Plaintiff waives a deficiency judgment, the sale shall be final on December 7, 2009; and

i. the property will be sold without any warranty or representation as to title or otherwise by Plaintiff or Plaintiff's counsel.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED:

That if Plaintiff or Plaintiff's representative fails to appear at the scheduled sale, the property shall be withdrawn from sale and the sale shall be rescheduled for the next available sales day.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED:

That the proceeds derived from the sale shall be applied as follows:

First, to the payment of all costs and expenses of this action, including a fee for the Plaintiff's attorneys as heretofore provided and any Guardian ad Litem fees or fees for attorneys appointed by the Court; next to the payment of the amount due upon the Note

and Mortgage owned by Plaintiff; and finally, after disbursing the proceeds of the sale as aforesaid, that any balance thereafter remaining be held by the Master in Equity subject to further Order of this Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED:

That if Plaintiff is the successful bidder at the sale, for a sum not exceeding the amount of costs, expenses, and Plaintiff's indebtedness in full, Plaintiff may pay to the Master in Equity only the amount of the costs and expenses, crediting the balance of the bid on Plaintiff's indebtedness.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED:

That the afore-described property shall be sold subject to any property taxes that are due, past due, or accruing as of the date of sale and/or compliance and that the sale shall be final at the close of bidding.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED:

That, in compliance with § 30-9-31 of the Code of Laws of South Carolina, 1976, as amended, any deed of conveyance made pursuant to this sale shall be indexed in the grantor index by the Register of Deeds Office for Spartanburg County in the name of the owner of record of the subject property immediately prior to the execution of the Clerk's deed, as well as in the name of the Master in Equity who executes such deed as grantor.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED:

That any prior lien that has been paid in full is hereby satisfied and cancelled of record.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED:

That this action shall remain open for any other proper purpose.

MASTER IN EQUITY

Spartanburg, South Carolina

Date: October 26, 2009

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