

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

First Citizens Bank and)
Trust Company, Inc.,)
)
Plaintiff,)

vs.)

Richard E. Harper,)
South Carolina Department)
of Revenue, and)
Tamara C. Miller,)
)
Defendants.)

**FORECLOSURE DECREE
(Deficiency Sought)**

Non-Eligible under HMP

C.A. No.: 2009-CP-42-2953

FILED COURT
CLERK OF COURT
SPARTANBURG COUNTY
2009 OCT 26 AM 11:35
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. The Defendant, South Carolina Department of Revenue timely filed an Answer by and through Lynn M. Baker. No other appearance was entered for the remaining 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 May 8, 2009 and a Refiled and Amended Lis Pendens was filed on May 21, 2009, in the Office of the Spartanburg County Clerk of Court.

2. The Summons and Complaint were filed on May 21, 2009, in the Office of the Spartanburg County Clerk of Court.

3. All Defendants have been properly served with, or accepted service of, the Lis Pendens, Summons, and Complaint.

4. Defendants, Richard E. Harper and Tamara C. Miller 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. On May 4, 2009, 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*, issued a Temporary Restraining Order "preventing the foreclosure sale of any property arising out of a loan owned or guaranteed by petitioner or Freddie Mac or held by a servicer who has signed an agreement to participate in the [Home Affordable Modification Program]."

9. Pursuant to the aforementioned Temporary Restraining Order, and pursuant to the directive of this Court, Plaintiff has filed and served an affidavit on all parties, as well as Fannie Mae and Freddie Mac, stating that the Loan, Note, and Mortgage, which are the subject of this foreclosure action, are not owned or guaranteed by Fannie Mae or Freddie Mac and are not owned, guaranteed, or managed by a servicer who has signed an agreement to participate in the Home Affordable Modification Program, and therefore are not subject to modification under the Homeowner Affordability and Stability Plan, the Home Affordable Modification Program, and/or the United States Treasury Supplemental Directive 09-01 (collectively referred to hereafter as "HMP").

10. A copy of Plaintiff's Affidavit, together with the Certificate of Service, has been filed with the Court and is of record herein.

11. Defendants have not filed a response to Plaintiff's Affidavit.

12. I find that the Loan, Note, and Mortgage giving rise to this foreclosure action are not subject to modification under the HMP and that the Temporary Restraining Order issued by the Supreme Court has been lifted.

13. I further find that Plaintiff has complied with the Administrative Order executed by the Honorable Jean Hofer 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, and that Plaintiff is entitled to proceed with this foreclosure action.

14. For value received, Defendant, Richard E. Harper (hereinafter "Debtor") executed and delivered a promissory note (hereinafter "Note") to Plaintiff dated April 14,

2005, containing a promise to pay the principal sum of One Hundred Twenty Five Thousand and 00/100 Dollars (\$125,000.00) with interest thereon and repayment terms as specified therein.

15. In order to secure the payment of said Note, 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:

All that piece, parcel or lot of land, with improvements thereon, situate in the County of Spartanburg, State of South Carolina, and being shown and designated as Lot No. 30 and Lot 30B, Oak Forest Subdivision, Phase II, on plat for Mark D. Line and Pamela J. Line by John Robert Jennings, RLS, dated September 30, 1992, and recorded in Plat Book 118, Page 209, ROD Office for Spartanburg County. Reference is hereby made to said plat for a more detailed metes and bounds description.

This is the same property conveyed to Mortgager herein by deed from Sheila L. Harper dated April 14, 2005, which is to be recorded herewith and also, deed from Rodger C. Jarrell recorded January 12, 2004, in Book 79-M, Page 282, ROD Office for Spartanburg County.

16. The Mortgage was recorded in Mortgage Book 3425 at Pages 889 on April 19, 2005, in the Register of Deeds Office for Spartanburg County.

17. Debtor was the record owner of the subject real property as of the date the Lis Pendens was filed. Plaintiff is the lawful owner and holder of the Note and Mortgage. The Mortgage constitutes a second lien upon the subject property, subject to the mortgage of Citizens Building and Loan Association.

18. 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 reasonable attorney's fees and costs to be added to the outstanding indebtedness should the Note and Mortgage be placed in the hands of an attorney for collection.

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

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

21. Plaintiff is entitled to foreclose the Mortgage.

22. 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. The loan documents provide for reasonable fees of not less than 15% of the amount owing. 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. In light of the above, the size of the mortgage debt, and Plaintiff's attorney's qualifications, Four Thousand and no/100 Dollars (\$4,000.00) 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 Seven Hundred Fifty Three and 27/100 Dollars (\$753.27).

23. The amount due and owing on the Note and secured by the Mortgage, as of the date of hearing, with interest at the rate provided in the Note (currently 6.75%) and other costs and expenses of collection, exclusive of costs and attorney's fees, with a daily accrual rate of \$25.11 is as follows:

a.	Principal Balance:	\$135,110.13
b.	Interest Due:	\$1,291.17
c.	Late Charges:	\$309.01
	BALANCE DUE:	\$136,710.31
	Attorney Fees:	\$4,000.00
	Costs to Date:	\$753.27
	TOTAL AMOUNT DUE:	\$141,463.58

24. The post-judgment interest rate shall be at the legal rate.

25. The anticipated balance due and owing by Debtor as of Sales Day December 7, 2009, shall be One Hundred Thirty Seven Thousand Seven Hundred Sixty Five and 31/100 Dollars (\$137,765.31), exclusive of costs and attorney's fees, with a daily accrual rate of \$25.11.

26. Plaintiff is seeking a deficiency judgment as to Debtor.

27. Plaintiff is entitled to have any equity of redemption barred and to have the property sold at public auction on Legal Sales Day December 7, 2009, with the

proceeds to be applied towards costs and expenses, attorney's fees, and the mortgage indebtedness.

28. Defendants set out hereinafter have been 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. I find that said lien or claim is subordinate to the first lien of the Plaintiff:

a. Tamara C. Miller is made a party to this action by way of that certain Contract for Deed naming Richard E. Harper as Seller and Tamara C. Miller as Purchaser, dated November 10, 2008 and recorded on November 14, 2008 in the Spartanburg County Register of Deeds Office in Deed Book 92, Page 258.

b. The South Carolina Department of Revenue is made a party to this action by way of that certain tax lien having Tax Lien Number 3-50705165-2, filed with the Spartanburg County Register of Deeds Office on April 6, 2006, and recorded in State Tax Lien Book S-27, page 327.

c. The South Carolina Department of Revenue is made a party to this action by way of that certain tax lien having Tax Lien Number 3-50712662-4, filed with the Spartanburg County Register of Deeds Office on May 22, 2006, in State Tax Lien Book S-28, page 398.

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 Hofer 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 should 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 One Hundred Thirty Six Thousand Seven Hundred Ten and 31/100 Dollars (\$136,710.31) plus attorney's fees of \$4,000.00 and all costs and expenses of this action, which to date total \$753.27, with interest on said debt from the date of hearing through the date of compliance at the contract rate (currently 6.75%) and thereafter, in the event of a deficiency judgment, at the legal judgment rate.

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 subject to the mortgage lien of Citizens Building and Loan Association.

6. The Master In Equity for Spartanburg County, South Carolina, after having duly advertised the mortgaged premises for 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 seeking a deficiency judgment, the sale shall remain open for a period of thirty days after the initial sale; 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 on the deficiency sales date.

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 ROD Office for Spartanburg County in the name of the owner of record of the subject property immediately prior to the execution of the Master In Equity'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 in the event there be any deficiency remaining on the indebtedness due Plaintiff after the proceeds of sale are applied to the indebtedness due as outlined above, said deficiency shall be assessed against Debtor and Plaintiff shall have personal judgment against Debtor for the amount of said deficiency.

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 pursuant to Section 29-3-650 of the Code of Laws of South Carolina, 1976, as amended, the Clerk of Court is hereby directed to immediately enter judgment against Chris A. Jenkins in the amount of One Hundred Thirty Seven Thousand Seven Hundred Sixty Five and 31/100 Dollars (\$137,765.31), plus attorney's fees of \$4,000.00 and all

costs and expenses of this action, which to date total \$753.27, any subsequent necessary advances and interest from the date of hearing through the date of compliance at the contract rate and thereafter, in the event of any deficiency, at the legal rate, and docket said judgment in the Clerk's office in the same manner as any other judgment. Upon the sale of the mortgaged premises, the Court shall credit upon the judgment the amount paid to the Plaintiff from the proceeds of the sale or, in the event the Plaintiff is the successful bidder, the amount of Plaintiff's bid.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED:

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

Spartanburg, South Carolina

Master in Equity for Spartanburg County

Date: October 26, 2009

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