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STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
Case #: 2009-CP-42-6656

CapitalBank,)
)
Plaintiff,)

vs.)

Foreclosure Decree

Durham Construction, Inc. a/k/a)
Durham Construction Co., Inc.,)
Larry D. Durham a/k/a Larry)
Durham, and Wanda B. Durham)
a/k/a Wanda Durham,)
)
Defendant(s).)

(Non-eligible under the Home Affordable
Modification Program)
(Deficiency Judgments Requested as to
Durham Construction, Inc. a/k/a Durham
Construction Co., Inc., Larry D. Durham
a/k/a Larry Durham and Wanda B. Durham
a/k/a Wanda Durham)

Pursuant to Circuit Rule 53 of the South Carolina Rules of Civil Procedure the above-entitled matter was referred to the undersigned to make appropriate findings of facts and conclusions of law with authority to enter a final judgment in the case.

Pursuant to the Order of Reference a hearing was held, attended by Plaintiff's attorney of record. Testimony was taken (herewith reported). From the testimony and evidence I make the following Findings of Fact, Conclusions of Law, and Order.

Findings of Fact

1. The Lis Pendens was filed in the Records for Spartanburg County (hereafter 'Records') on December 10, 2009.
2. The Summons and Complaint were filed on December 10, 2009.
3. Defendants Durham Construction, Inc. a/k/a Durham Construction Co., Inc.

(hereafter 'Durham Construction'), Larry D. Durham a/k/a Larry Durham (hereafter 'L Durham') and Wanda B. Durham a/k/a Wanda Durham (hereafter 'W Durham') are in default. No demurrers, answers or notices of appearance have been filed with the attorneys for the Plaintiff, as shown by the Affidavit(s) of Default. Time for filing answers, demurrers, or notices of appearances has expired.

4. This is an action brought for the foreclosure of a real estate mortgage. Defendants have been served properly. The Court has jurisdiction of the parties and the real estate (which is located entirely in Spartanburg County, South Carolina).

5. The mortgage loan which is the subject of this action is not owned, securitized or guaranteed by the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac), and the server is not participating in the Home Affordable Modification Program (HMP). The HMP is inapplicable.

6. Plaintiff is now the owner and holder of a certain line of credit agreement, mortgage note and mortgage executed by Durham Construction, Inc. erroneously designated as 'Durham Construction Co., Inc.' and delivered to CapitalBank on May 9, 2007 in the original amount of One Hundred Fifty-Nine Thousand Two Hundred and no/100s (\$159,200.00) Dollars, with interest.

7. Later Durham Construction, Inc. erroneously designated as 'Durham Construction Co., Inc.' entered into Commercial Debt Modification Agreements dated February 20, 2008 and February 2, 2009 with CapitalBank.

8. Plaintiff is the owner and holder of certain Guaranties dated May 9, 2007 and February 2, 2009 wherein Larry D. Durham a/k/a Larry Durham and Wanda B. Durham a/k/a

Wanda Durham guaranteed to Plaintiff certain obligations of Durham Construction, Inc. erroneously designated as 'Durham Construction Co., Inc.'

9. Due to scrivener's error the above-reference documents contained the name 'Durham Construction Co., Inc.' whereas the correct corporate name for the legal entity which executed the afore-mentioned documents is 'Durham Construction, Inc.' as shown in the records of the South Carolina Secretary of State's Office. Also, the deed into Borrower for the property mortgaged in the Mortgage above-referenced is in the name of 'Durham Construction, Inc.'

10. The documents above-referenced should be under the name 'Durham Construction, Inc.', and the Court should reform the Line of Credit Agreement, Note, Mortgage, Commercial Debt Modification Agreements dated February 20, 2008 and February 2, 2009 and Guaranties dated May 9, 2007 and February 2, 2009 to read and state the name of Borrower and Mortgagor as 'Durham Construction, Inc.' so as to reflect the correct legal name of Borrower and Mortgagor and intent of the parties.

11. Plaintiff is now the owner and holder of a certain mortgage executed by Durham Construction, Inc. erroneously designated as 'Durham Construction Co., Inc.' (hereafter referred to as 'Durham Construction') and delivered to CapitalBank on May 9, 2007 in the original amount of One Hundred Fifty-Nine Thousand Two Hundred and no/100s (\$159,200.00) Dollars, with interest.

12. Durham Construction, Inc. is currently the owner and holder of the real estate the legal description of which appears on the face of the mortgage referenced herein which is as follows:

ALL that piece, parcel or lot of land, with improvements thereon or to be constructed thereon, situate, lying and being in the State of South Carolina, County of Spartanburg, and being shown

and designated as Lot 39, on a Survey of Shady Grove Hills, Phase 1, Section 5, by Lavender, Smith & Associates, Inc., Land Surveyors & Mappers, dated January 23, 2007, recorded in the ROD Office for Spartanburg County, in Plat Book 161, page 167. Reference is made to said plat for a more complete description as to metes and bounds.

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Address of Property: 510 Gibbs Rd., Wellford, SC 29385

13. Due to scrivener's error the above-mentioned legal description contains an incorrect date for the survey by Lavender, Smith & Associates, Inc., Land Surveyors & Mappers. The legal description in the Mortgage lists the date of said plat as 'January 23, 2007' whereas the correct date of the plat is 'January 7, 2007, revised January 18, 2007'.

14. The mortgage should be reformed to cite the correct plat date in the legal description of the property, and that the legal description of the property should be reformed to read as follows:

ALL that piece, parcel or lot of land, with improvements thereon or to be constructed thereon, situate, lying and being in the State of South Carolina, County of Spartanburg, and being shown and designated as Lot 39, on a Survey of Shady Grove Hills, Phase 1, Section 5, by Lavender, Smith & Associates, Inc., Land Surveyors & Mappers, dated January 7, 2007, revised January 18, 2007 recorded in the ROD Office for Spartanburg County, in Plat Book 161, page 167. Reference is made to said plat for a more complete description as to metes and bounds.

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15. On May 9, 2007 Durham Construction executed and delivered to CapitalBank a Line of Credit Agreement for One Hundred Fifty-Nine Thousand Two Hundred and no/100s (\$159,200.00) Dollars.

16. On May 9, 2007, Durham Construction gave Plaintiff a written Promissory Note. On the same day, Durham Construction executed and delivered to Plaintiff a Mortgage as security for the Note (both in the original amount of One Hundred Fifty-Nine Thousand Two Hundred and no/100ths (\$159,200.00) Dollars, with interest thereon at nine point two five

(9.25%) percent with a variable rate of one (1%) percent over the index as published in the Wall Street Journal and a maturity date of February 9, 2008. The Mortgage was recorded in the Records on May 14, 2007 in Mortgage Book 3889 at Page 971.

17. Consecutive monthly installment payments of interest were due until February 9, 2008 when the entire balance of principal, interest and all other indebtedness owed by Borrower(s) to Note Holder (if any) were due and payable.

18. Defendants L Durham and W Durham gave Plaintiff their personal continuing guaranty dated May 9, 2007 whereby they each unconditionally guaranteed to Plaintiff the timely payment and performance of all liabilities of Borrower to Plaintiff.

19. Thereafter, Durham Construction entered into a Commercial Debt Modification Agreement with CapitalBank dated February 20, 2008 wherein the amount remaining due was \$157,783.00, the interest rate was a fixed rate of seven (7%) percent and maturity was extended "by 36 months from 2/22/2008 to 2/22/2011. Payments to change from interest only to 20 year amortization with a 3 year balloon."

20. Thereafter, Durham Construction entered into a Commercial Debt Modification Agreement with CapitalBank dated February 2, 2009 wherein the total amount owed was \$155,761.42, the interest rate was a fixed rate of seven (7%) percent and payments were to be calculated based on a 30 year amortization with a 3 year balloon. L Durham and W Durham gave their continuing Guaranty dated February 2, 2009 wherein they unconditionally guaranteed to Plaintiff the performance and payment of all obligations of Borrower to Plaintiff.

21. Durham Construction has defaulted in payment of the interest installments which became due and payable. Plaintiff has exercised its option to declare the full amount due and

payable. Therefore, Durham Construction is in default. The entire balance of principal and accrued interest is due and payable, and Plaintiff is entitled to foreclosure.

22. Based on the complexity, responsibility, and time involved, \$3,500.00 is a reasonable fee for Plaintiff's attorney (for services performed and anticipated to be performed until final adjudication of this action) as provided for under the terms of the note and mortgage.

23. The amount due and owing on the note, with interest at the rate provided in the note (and other costs and expenses of collection, including an attorney's fee) is as follows:

(a)	Principal due through February 4, 2010	\$ 156,166.34
	Interest due through February 4, 2010	\$ 10,144.61
	Late Fees Due	\$ 580.47
	2008 Taxes paid	\$ 3,555.23
(b)	Costs of collection prior to hearing:	
	Case Filing Fee	\$ 150.00
	Filing Order of Reference	\$ 25.00
	Service fees	\$ 225.00
	Postage and copies	\$ 75.00
	Title Abstractor Fee	\$ 136.00
(c)	Attorney's fee	\$ 3,500.00
(d)	Master's fee	\$ 125.00

TOTAL DEBT secured by note and mortgage, including interest to date shown: \$ 174,682.65

Interest (at above-stated rate) for the period from the date shown in (a) above through the date of this judgment should be added to the "total debt" (above) and is the judgment debt herein. Interest (after the date of judgment at the judgment rate of 7.25%) should be added to the judgment debt to comprise Plaintiff's debt secured by the mortgage through the date to which

such interest is computed.

24. Plaintiff has filed the necessary affidavit(s) in connection with the requirements of the Soldiers and Sailors Civil Relief Act of 1940 USCA, Title 50 App., Section 501, et. seq. I can find no basis for a stay of this proceeding.

25. Plaintiff specifically demands a deficiency judgment against Durham Construction, L Durham and W Durham pursuant to S. C. Code Ann. Section 29-3-660 (1976) for any deficiency remaining after sale of the mortgaged premises. Plaintiff reserves its right to withdraw its demand for deficiency judgment at any time prior to the foreclosure sale herein.

26. Plaintiff is entitled to have judgment on the note and the mortgage foreclosed with the equity of redemption of Durham Construction forever barred. Plaintiff is entitled to have the premises sold at public auction on Legal Sales Day on March 1, 2010 or some subsequent Legal Sales Day. The sale shall bar the equity of redemption. The sale shall be subject to Spartanburg County property taxes and easements, to existing easements and to existing restrictions of record. The proceeds derived from the sale (after payments of costs and expenses of this action, including attorney's fees) shall be applied to the satisfaction of Durham Construction's indebtedness to Plaintiff.

CONCLUSIONS OF LAW

I, therefore, conclude as follows:

27. The lien of Plaintiff constitutes a First Lien on the property. Plaintiff should have judgment on the note and foreclosure of the mortgage.

28. The mortgaged property should be ordered sold at public auction after due advertisement. The sale shall be subject to Spartanburg County taxes and assessments (due on

the day of sale), to existing easements of record, to existing restrictions of record. After making the required deposit at the time of bid, the successful bidder at the sale should be required to pay interest (from the date of sale through the date of compliance) at the rate set forth above.

29. The proceeds arising from such sale should be applied as set out below. a). First, to costs and disbursements of this action (plus reasonable attorney's fees); b). Next, to payment and discharge of Plaintiff's debt plus interest (or so much thereof as the proceeds will pay); and c). Last, any surplus to held pending further order of this court.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows.

A. This matter is properly before the Court.

B. The Line of Credit Agreement, Note, Mortgage, Commercial Debt Modification Agreements dated February 20, 2008 and February 2, 2009 and Guaranties dated May 9, 2007 and February 2, 2009 are reformed to read and state the name of Borrower and Mortgagor as 'Durham Construction, Inc.' so as to reflect the correct legal name of Borrower and Mortgagor and intent of the parties.

C. The mortgage is hereby reformed to cite the correct plat date in the legal description of the property, and the legal description of the property should be reformed to read as follows:

ALL that piece, parcel or lot of land, with improvements thereon or to be constructed thereon, situate, lying and being in the State of South Carolina, County of Spartanburg, and being shown and designated as Lot 39, on a Survey of Shady Grove Hills, Phase 1, Section 5, by Lavender, Smith & Associates, Inc., Land Surveyors & Mappers, dated January 7, 2007, revised January 18, 2007 recorded in the ROD Office for Spartanburg County, in Plat Book 161, page 167.

Reference is made to said plat for a more complete description as to metes and bounds.

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D. Plaintiff is due \$174,682.65 on its mortgage which constitutes a First Lien on the Subject Property. This amount is the "Total Debt" due Plaintiff as set out in paragraph 23, infra, (together with interest at the rate provided in said obligation on the balance of principal from aforesaid date to the date hereof).

E. The amount due in the preceding paragraph (the "Total Debt" as set forth in paragraph 23, infra, and later accrued interest on the principal) constitutes the total judgment debt due Plaintiff. Plaintiff's total judgment debt shall bear interest hereafter at the rate of 7.25% per annum.

F. On or before the date of sale of the property (hereinafter described), Durham Construction shall pay to Plaintiff, (or Plaintiff's attorney), the amount of Plaintiff's total debt mentioned above, plus costs and disbursements of this action.

G. On default of payment (at or before the time herein indicated), the mortgaged premises (described hereafter) shall be sold by the Master in Equity for Spartanburg County, at public auction, at the Spartanburg County Court House, in Spartanburg, South Carolina on March 1, 2010 or some convenient Sales Day thereafter. Should the regular day of judicial sales fall on a legal holiday, then the Sales Day shall be on Tuesday next succeeding such holiday. The following terms shall govern the sale.

(a) CASH: The Master shall require a deposit of five (5%) per cent of the bid (in cash or equivalent) at the time of the bid, (if the successful bidder be other than Plaintiff). Such deposit shall be applied on the purchase price only upon compliance (within twenty (20) days) with the bid. In case of non-compliance the deposit will be forfeited and applied to the costs and to Plaintiff's debt.

(b) INTEREST: Interest on the balance of the bid shall be paid through the day of compliance at the rate of 7.25%.

(c) SALE: The sale shall be subject to Spartanburg County taxes and assessments, to existing easements and to existing restrictions of record.

(d) PURCHASER: Purchaser shall pay for the preparation of the deed, deed stamps, and costs of recording the deed.

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

I. Since a personal or deficiency judgment is demanded, bidding will remain open for thirty (30) days after the date of sale (as provided by law in such cases), unless Plaintiff withdraws its demand prior to sale pursuant to S. C. Code Ann. Section 29-3-660 (1976) as amended.

J. The Master in Equity will advertise according to law. The advertisement shall give notice of the time and place of such sale and the terms thereof. The Master in Equity will execute to the purchaser(s) a deed to the premises sold subject to Spartanburg County taxes and assessments (due on the day of sale), to existing easements of record, and to existing restrictions of record. Plaintiff, or any other party to this action, may become a purchaser at such sale. If, upon such sale being made, the purchaser(s) should fail to comply with the terms thereof within twenty (20) days after date of sale, then the Master in Equity may advertise the premises for sale on the next (or some other subsequent Sales Day) at the risk of the former highest bidder, (and so

from time to time thereafter until a full compliance shall be secured). If Plaintiff is the successful bidder, then at its option (or the option of its assignee), the deed may be taken subject to payment by grantee of any taxes or assessments constituting a lien against the property sold under this Order.

K. The Master in Equity shall apply the proceeds of the sale as follows: a). First to payment of the costs of this action; b). Then, to payment of Plaintiff's debt, (including principal, interest, escrow deficits, and attorney's fees as herein-above provided); and, c). any balance shall be held pending a further order of this court.

L. If the successful bidder is other than Plaintiff in possession of the property, the Sheriff of Spartanburg County is ordered and directed to eject and remove the occupant(s) of the property sold, together with all personal property located thereon. The Sheriff of Spartanburg County shall put the successful bidder (or his assigns) in full, quiet and peaceable possession of the premises without delay and shall keep the successful bidder (or his assigns) in such peaceable possession. Any interference with the activities of the Sheriff, or any of his deputies, as herein authorized, may constitute contempt of this Court and subject the persons(s) causing or responsible for such interference to punishment for this offense. Certified copies of the deed and this decree shall constitute sufficient warrant and authority to permit the summary eviction and ejectment hereby authorized, without the need for a separate Writ of Assistance.

M. Durham Construction (and all persons claiming under him, her, them, or it), are forever barred and foreclosed of all right, title, interest, and equity of redemption in the mortgaged premises sold (or any part thereof).

N. The deed of conveyance made pursuant to the sale shall contain the names of only

the first-named Plaintiff and the named Defendant(s) who is/are the titleholder(s) of the mortgaged property (at the time of filing the notice of pendency of this action) and the name of the grantee(s). The Clerk of Court for Spartanburg County is authorized to omit from the indices pertaining to such conveyance the name(s) of all parties not contained in the deed.

O. The following is a description of the premises herein ordered to be sold:

ALL that piece, parcel or lot of land, with improvements thereon or to be constructed thereon, situate, lying and being in the State of South Carolina, County of Spartanburg, and being shown and designated as Lot 39, on a Survey of Shady Grove Hills, Phase 1, Section 5, by Lavender, Smith & Associates, Inc., Land Surveyors & Mappers, dated January 23, 2007, recorded in the ROD Office for Spartanburg County, in Plat Book 161, page 167. Reference is made to said plat for a more complete description as to metes and bounds.

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IT IS SO ORDERED.

Gordon G. Cooper
Master in Equity
Spartanburg, South Carolina

February __, 2010.

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