IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

No. 2010-CA-01584

CONGRESS STREET PROPERTIES, LLC AND
930 BLUES CAFÉ, LLC

APPELLANTS

V.

BMR FUNDING, LLC

APPELLEE

On appeal from the Chancery Court
of Hinds County, Mississippi

BRIEF OF APPELLANTS

Suzanne Keys
Byrd & Associates, PLLC
Post Office Box 19
Jackson, MS 39205
(601) 354-1210
Attorney for Plaintiff

Certificate of Interested Persons

The undersigned counsel of record certifies that he following listed persons have an interest in the outcome of this Case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. **Honorable Dwayne Thomas, Hinds County Chancery Judge;**

2. **Appellants: Congress Street Properties, LLC; 930 Blues Café, LLC;**

3. **Attorneys for Appellants: Suzanne Keys, Byrd & Associates, PLLC;**

4. **Appellees: BMR Funding, LLC;**

5. **Attorneys for Appellees:**

   William Smith
   Tara Ellis
   Alan Windham
   Balch & Bingham

Suzanne Keys

SUZANNE KEYS
Attorney for Appellants

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STATEMENT OF ISSUES

I. Whether the Trial Court erred in finding the Congress Street Properties, LLC Deed enforceable and confirming the foreclosure by BMR.

II. Whether the Trial Court erred in finding that the 930 Blues Café LLC Deed of Trust had not been satisfied and confirming the foreclosure by BMR.

PROCEDURAL AND FACTUAL BACKGROUND

I. Procedural Background

On December 10, 2009, in Cause No. G2009-1966, Plaintiff BMR Funding, LLC ("BMR") filed a Verified Complaint against the 930 Blues Café LLC for Temporary Restraining Order and Injunction, seeking possession of property it had foreclosed upon, located at 930 N. Congress Street and an order to the 930 Blues Café LLC to vacate the property. (R.000066) It further requested a permanent injunction ordering the same relief. On the same day, BMR filed a similar pleading against Congress Street Properties ("CSP"), Cause No. G2009-1965, seeking similar relief with respect to property it had foreclosed upon located at 939 N. President Street. CSP and the 930 Blues Club filed their answers and affirmative defenses (R.000024; R. 000089) The Court consolidated these causes by Order, dated January 29, 2010. ®. 000063)

On February 8, 2010, BMR noticed the Complaints for Temporary Restraining Orders for hearing, setting same for February 19, 2010. (R.000148) Prior to the hearing date, CSP and the 930 Blues Café and others filed an action against BMR Funding and others*(Congress Street Properties, et al v. SouthTrust Bank, et al, G2010-0132)* raising legal claims on events that led up to the foreclosures by which BMR claims titled to these properties. CSP, et al filed a

Motion to Consolidate that case with these consolidated cases (R.000266); however, before that could be heard, the Defendants to that other action (including BMR Funding, LLC) removed the case to federal court.

Because that companion case involved parties who could potentially be prejudiced by any premature ruling by the Trial Court in this case, on the issues of the validity of the deeds of trust that led to the foreclosures, the Trial Court stayed action in this consolidated case for ninety days. (R.000518). The Court was anticipating a resolution to the remand motion Plaintiffs had filed in the other case and if remanded, the Trial Court would then be able to proceed with all parties with an interest in these properties before it. Unfortunately, the removed case was not remanded until after the hearing in this case, just days before the Trial Court in this case entered its judgment.

During the ninety day stay, the Trial Court appointed a Special Master on March 30, 2010, Mr. Guthrie T. Abbott. (R.000521) The Court ordered the parties to submit their proof to him and required a report from him on June 1, 2010. On May 15, 2010, Mr. Abbott reported to the Court that he felt a hearing on the validity and enforceability of the deeds of trust to the two properties was needed so that the Court could make the factual findings necessary to any legal opinion. On June 15, 2010, the Court forwarded this report to the parties and instructed them to

set the matter for hearing. (Ex. 72 to August 22, 2010 hearing)

Prior to the hearing, the parties submitted a Pre-Trial Order (R.000672) and additional documents and affidavits were entered into evidence on August 11, 2010. The Court heard argument from both sides. (Tr. 1 et seq.)

On or about September 2, 2010, the Trial Court made its ruling, finding for BMR. (R.709, RE 9). CSP and the 930 Blues Café filed a Motion to Reconsider and Amend Judgment on September 8, 2010 (R.000719, R E16) which BMR opposed (R.000731) The Trial Court denied the Motion to Reconsider on September 28, 2010 (R.000751, RE 25). From those rulings, Congress Street Properties, LLC and 930 Blues Café, LLC appealed on September 28, 2010 (R.000758, RE 27).

II. Facts

Part I.- 933 N. President Street Property

933 N. President Street Property and Deed of Trust

Congress Street Properties, LLC ("CSP") is a limited liability company, formed in May, 2001 whose principal member was Isaac K. Byrd, Jr. (RE 89). In early March of 2002, CSP, as the purchaser, entered into an agreement with Protective Life Insurance Co. ("PLI") as seller, to purchase certain lands PLI owned located on North President Street in Jackson, Mississippi. (RE 29, Exhibit

D-1)). The property consisted of two separate, though adjacent parcels[1]:

a. The first was "939 N. President St.", which included an office building, three subdivisional lots, and a ten foot strip off of the north end of a fourth lot. (See Deed to PLI from James Lancaster, RE 33 , Exhibit D-2)

b. The second was "933 N. President St.", which consisted of a vacant lot that lies South of part one. (See Deed to PLI from Lee Agnew, RE 35, Exhibit D-3)

In consideration for this purchase, CSP paid unto PLI $10,000 cash, with the remaining balance of $618,000 due within a specified time.

A plat for the land involved, attached to Jennifer Wilson's Affidavit (RE. . Exhibit 26), indicates the deed books and page numbers that describe the various parcels. The deed to PLI of the 939 N. President parcel (RE. 33, Exhibit 37, D-2) reflects the legal description as:

> *Lots 1,2 and 4 of Florence Green Partition , located in ten(10) acre Lot N. 8, North Jackson, ...*
>
> *And Also:*
> *Ten (10) feet of North End of Lot 2 Hamilton Subdivision...*

The legal description of the second parcel specifically identified as "933 N. President" conveyed to PLI is:

> *Lot 1, Hamilton Subdivision of the S ½ of NE 1/4 of 10 acre, Lot No. 8, North Jackson ...*
>
> *Being property situated at and numbered 933 on North President Street,*

[1]It is important to note that there was no proof that at any time separate and individual municipal addresses been merged into one description, and under one municipal address.

Jackson, MS

The legal description of 933 N. President Street includes the legal address (vacant lot or not) and the attachment to the Contract for Purchase notes that the vacant lot is a separate parcel of property. (RE 29 , D-1) In an affidavit entered by BMR from Quin Breland, an attorney, (RE. 41, Exhibit 1, sub-exhibit 2 to vol. 1 of Exhibits) Mr. Breland refers to 933 and 939 N. President being separate parcels with separate parcel numbers placed by the tax assessor. There was no proof that at any time the two separate and individual properties at these municipal addresses were ever merged into one description, or under one municipal address.

The purchase, financing, closing

While CSP was purchasing these two parcels from Protective Life Insurance Company, CSP arranged financing with SouthTrust Bank ("STB"), now known as Wachovia. An agent for STB prepared the following instruments: promissory note (RE 50, Exhibit 39, D-4) , deed of trust (RE 54, Exhibit 40, D-5) and the assignment of rents to the two story office building (RE 60, Exhibit 41, D-6), that Mr. Byrd on behalf of CSP was to execute. On page two of the Promissory Note the collateral noted is:

> **Borrower acknowledges this Note is secured by First Deed of Trust dated April 29, 2002 <u>on 939 President Street, Jackson, Hinds County,</u>**

Mississippi (*emphasis added)*

No legal description was given, nor was there attached to the promissory note any Exhibit that would include a legal description. After referencing an Exhibit A which was not attached, the Deed of Trust states that the property is **The Real Property or its address is commonly known as 939 north President Street, Jackson, MS 39201.** Each one of the documents as prepared by STB acknowledged the security as being the real property at the address is commonly known as "939 N. President St. Jackson, Ms. 39201". This statement clearly shows that the parcel to be taken as security was the "939 N. President" . The indexing instructions to the Clerk at the top of the Deed of Trust also states "939 N. President Street, Jackson, Hinds County, Mississippi."

Paul Henderson,("Henderson") at the law firm of Young, Williams, Henderson & Fuselier, P.A., now known as Young- Williams, PA., ("YWHF" or "YW") was the closing attorney for the sale and that Jenny Wilson, a paralegal in Henderson's office, submitted a request for a title abstract on the property to First American Abstract Company (RE 65, Exhibit 42, D-7). On March 15, 2002, First American completed the title abstract work and submitted two separate typed title reports to Henderson. The first report (RE 66 , Exhibit 43, D-8), file number 15972-H(A), was on the 939 N. President St. parcel. The report also identified the

tax identification parcel numbers that for this municipal address as being: 39-55; 39-57; 39-58.[2] The second title report submitted by First American, was for file number 15971-H(B), which is on the 933 N. President St. parcel (Lot 1 Hamilton Subdivision...) (RE 73, Exhibit 44, D-9). The report also identified the tax identification parcel number for this municipal address, which is Parcel No. 39-51. Thus, First American clearly distinguished the two properties as separate from each other and put Paul Henderson on notice of same.

On April 10, 2002, Paul Henderson sent two certificates of title to Ms. Shauna Yeldell at SouthTrust Bank. One was on the 939 N. President property (RE 79, Exhibit 45, D-10) and one was on the 933 N. President property (RE 82 Exhibit 46, D-11). Thus, SouthTrust Bank knew that these were two separate parcels, and in the absence of any proof to the contrary, it must be concluded that SouthTrust chose the property it wanted to take as collateral.

The Closing Statement (RE 84, Exhibit 30) reflects the contract between PLI and CSP and what PLI would convey and what CSP would pay. These documents - the Closing Statement, Contract for purchase, and Special Warranty

[2]39-55 is the parcel no. for Lots 1 & 2, Florence Green Partition; 39-57 is the parcel no. for Lot 4, Florence Green Partition; and 39-58 is the parcel no. for the ten (10') strip off of the N. end of Lot 2, Hamilton Sub. These three parcel numbers collectively comprise the real property identified by the municipal address as 939 N. President St. This property was acquired by PLI on 05/04/1990 by virtue of a deed in lieu of foreclosure of a deed of trust in the amount of $900,000.00.

Deed have no bearing on the intent of the parties to the financing instruments, mainly, *the Deed of Trust*, which was a separate contract between CSP and SouthTrust Bank, and to what properties they intended to be encumbered. There is absolutely no proof in the record that "Banks always take a lien on the property you purchase with their money" as argued by BMR. To the contrary, SouthTrust Bank could freely choose what property it wanted as collateral and could have listed both if it wanted. But it did not.

The only uncontroverted proof in the record as to the intent of CSP is Mr. Byrd's statement that he did not intend to put the vacant lot up as collateral for the loan .(RE 89, Exhibit 14, vol. 1 of 2). His testimony is supported by the fact that he did not have to, since the two story office building property, worth in excess of $1 million, was sufficient to collateralize the $618,000 loan. (See Exhibit 71, D-34- while this appraisal was done two years later, it was of the same office building that was still being rented out). Moreover, it is clear that by virtue of the Certificates of Title sent to it by Attorney Henderson, and the draft closing statement, SouthTrust Bank knew that the sales transaction included two separate parcels of property - one located at 939 N. President and one located at 933 N. President. Knowing this, SouthTrust Bank proceeded to prepare the Deed of Trust and promissory note, and clearly wrote that the collateral taken was property

located at 939 N. President Street. This shows that the intent of the parties was only to secure the loan with the 939 N. President Street parcel.

On April 29, 2002 Mr. Byrd, on behalf of CSP, signed and delivered the promissory note, deed of trust and the assignment of rents. Again, the promissory note and the security instruments were **prepared by the Bank,** and not the closing attorney and/or his firm, whose main and profound charge, was to conduct the closing in a professional manner, and in strict accordance with the documents.

Because PLI was selling both the 933 and the 939 properties simultaneously, the Special Warranty Deed (RE 99, Exhibit 47, D-12) includes the legal descriptions of both. However, because the only property securing any loan was the property located at 939 N. President, the promissory note and the deed of trust identify only it as the property encumbered, and identify it only by street address: "property located at 939 N. President St.". Because there was no Exhibit A attached and because the Deed of Trust clearly covered that property located at 939 N. President, it is clear that the 949 N. President parcel alone was to collateralize the loan.

Recording of 933 N. President Deed of Trust

On May 9, 2002 the special warranty deed, the deed of trust and the assignment of rents were recorded in the land deed records in the Office of the

Chancery Clerk of Hinds County, Ms. The warranty deed (RE 99,Exhibit 47, D - 12) was recorded in Bk. 5565, Pg. 730; the deed of trust (RE. 54, Exhibit 30, D-5) in Bk. 5569, Pg. 113; and the assignment of rents in Bk. 5565, Pg. 767 (RE . 60 Exhibit 41,D. 6). The originals of these instruments would have been sent back to the closing attorney and then to the creditor for holding until the debt was paid, in this case, SouthTrust Bank.

On June 7, 2002 First American conducted a post closing update on the titles, which is performed before the issuance of the final title insurance policy. Again First American issued two Title Report Up-Dates, one on file no. 15972-H(A), 939 N. President St., (RE. 102, Exhibit 48, D-13) and one for file no. 15972-H(B), 933 N. President St. (RE. 107, Exhibit 49, D-14) . Both show the vesting deed as having been recorded at Bk. 5565, Pg. 730 and being filed on May 9, 2002. In the update report at paragraph one (1.), the last sentence in reference to the property description states: "Contains subject land and other land" (emphasis added), another indication that more than one parcel was involved.

Unauthorized Re-filing of 933 N. President Deed of Trust and Assignment of Rents

As noted earlier, the Deed of Trust and Assignment of Rents executed by CSP on April 29, 2002 contained no legal description to the 939 N. President

property. However, after the originals were sent back to Paul Henderson's office, someone attached the legal description from the special warranty deed and caused **the originals** to be re-recorded on June 19, 2002 in the land deed records in the Office of the Hinds County Chancery Clerk. Although the instruments contained the originals signed by Mr. Byrd on behalf of CSP on April 29, 2002, they were now also in essence new instruments. They now had attached an Exhibit A, which did not exist at the time of the original signing, and that Exhibit A included the 933 N. President property–which was not to be encumbered. This was a material change to the instrument and required an acknowledgment by the grantor, who did not give one. The deed of trust was re-recorded in Bk. 5590, Pg. 145, (RE. 112, Exhibit 50, D-15) and the assignment of rents was re-recorded in Bk. 5587, Pg. 720 (RE 119, Exhibit 51, D-16). At the time of the re-recording, CSP was unaware of the change and had not acknowledged or ratified the addition of Exhibit A. Neither Mr. Byrd, nor any other authority on behalf of and for CSP, gave a re-acknowledgment to the modified instrument; his initials are not placed on the legal description showing he validated it; and there was no acknowledgment or statement on the face of the instruments, or by a separate filing, that showed the cause for re-filing. On July 8, 2002, Mr. Byrd received a letter the a copy of the refilled deed of Trust (RE 124, Exhibit 7). However, that letter merely tells Mr.

Byrd of the refiling; it does not explain the changes made nor or ask him to sign a Corrected Deed of Trust.

Northgate Properties Purchase and Deed of Trust

The 939 N. President Deed of Trust was never modified or re-executed by CSP. While the property was listed as collateral on a loan for another entity, Northgate Properties[3], 939 N. President deed of trust was never modified and re-executed to secure the NGP note. Thus, the CSP deed of trust never actually secured the NGP note, and could not be foreclosed upon to collect if NGP failed to pay.

SouthTrust Bank merger, subsequent actions, and assignments

On January 3, 2005 SouthTrust Bank merged with and became Wachovia. All SouthTrust instruments and accounts became the property of Wachovia. Thus, the 939 N. President Deed of trust passed to Wachovia. On February 7, 2005, Wachovia substituted R. David Marchetti as trustee in the CSP deed of trust and instructed him to foreclose on the property (Exhibit 55, D-20). The substitution recites in the opening paragraph that the deed of trust is found in Bk. 5590, Pg. 145. Again, this is the book and page information for the improperly re-

[3] On April 25, 2001 Isaac Byrd formed Northgate Properties LLC ("NGP") and purchased the former Primos on North State Street, with a loan obtained from AmSouth Bank. After later purchasing the "939 N. President" property and financing that with SouthTrust Bank, Mr. Byrd and CSP decided to refinance the Amsouth loan on Northgate with SouthTrust Bank.

filed original. The first filing is not even mentioned.

The foreclosure was halted when STB had Mr. Byrd execute a Forbearance Agreement on March 15, 2005 (Exhibit 56, D-21). The Forbearance Agreement does not include the reaffirmation of the 939 N. President Deed of Trust or any modification or correction to said Deed of Trust.

In November of 2005, Wachovia, through Marchetti again began foreclosure, but halted it once more. Instead it filed suit in the U.S. District Court on the promissory notes and the other documents Mr. Byrd signed. On December 22, 2005, Wachovia assigned the CSP and the NGP note and security instruments to SPCP Group, LLC. (Exhibit 59, D-24) In the assignment, the CSP deed of trust was acknowledged as being dated April 29, 2002 and filed at Bk. 5590, Pg. 145. Again, this is incorrect. April 29, 2002 is the correct date the CSP instruments were executed, but Bk. 5590, Pg. 145 is the book and page information for the re-filed original, which was re-filed later. The original filing information is absent.

After service of the federal lawsuit, CSP, NGP and Mr. Byrd executed another Forbearance and Modification Agreement (Exhibit 57, D-22) on February 21, 2006, that required half of the indebtedness owed ($915,247.00) be paid by March 1, 2006.

On May 16, 2006 SPCP obtained a judgment in the U.S. District Court

against Mr. Byrd, CSP and NGP (R.000478, RE 127, Exhibit 58, D-23). This judgment is merely a monetary judgment and includes no declaratory relief, nor any adjudication of the validity of these deeds of trust.

On March 27, 2007 a second assignment for the CSP instruments from Wachovia to SPCP was filed in the land deed records in the Office of the Chancery Clerk for Hinds County at Bk. 6666, Pg. 486 (Exhibit 59, D-24). On April 17, 2007 SPCP substituted R. David Marchetti in the place and stead of William C. Smith, III in the CSP deed of trust (Exhibit 61, D-26). On December 15, 2008 SPCP substituted Jeremy L. Retherford for Marchetti in the CSP deed of trust (Exhibit 61, D-26). On March 15, 2009 SPCP assigned the CSP deed of trust to BMR.

Foreclosure on 939 N. President Property

Jeremy Retherford proceeded to foreclose on the 939 N. President property. He placed in the paper the Substitute Trustee's Notice of sale (Exhibit 67, D. 32) and on June 9, 2009 executed a substitute trustee's deed for the 939 N. President property and the 933 N. President property (RE. 151 Exhibit 15, vol 1 of 2). Though he claims to have conducted the sale in Jackson, Mississippi, the trustee's deed is acknowledged by a notary in Birmingham. (R.00362, RE 151)

Part II

930 Blues Café LLC June 25, 2008 Deed of Trust

As mentioned above, Northgate Properties LLC ("NGP") owned property on North State Street in Jackson, Mississippi. The deed of trust on it had been refinanced by SouthTrust Bank, which merged with Wachovia. Wachovia assigned the loan obligation and deed of trust to SPCP.

After the federal court judgment referenced above, in June of 2008, Mr. Byrd testified that he was being threatened with foreclosure so he sought to sell the Northgate property. (RE 89, Affidavit of Mr. Byrd) His agent, John Michael Holtman at Duckworth Realty found a buyer who would purchase the property for $900,000.00, which was far beneath its value, and all proceeds of the sale would go to SPCP. However, SPCP would not agree to the release of its deed of trust on the property, without an additional $200,000 being paid and secured by other property.

On June 12, 2008, John Michael Holtman sent Mr. Byrd a letter, (RE 130 Exhibit 18, vol. 1 of 2) seeking his agreement to pledge 946 North Congress *or another property mutually agreed to* as collateral for the $200,000. That other property ended up being the 930 Blues Café property.

On June 23, 2008 at 5:40 p.m., in an email (RE 132. Exhibit 63, D-28) from R. David Marchetti, attorney for SPCP, to John Michael Holtman, Marchetti wrote;

John Michael,

I understand that Byrd is willing to pledge the assets of 930 Blues Café to secure his promise to pay $200,000.00 in exchange for release of Northgate. In order to document this properly, I need something signed by Isaac or whomever is manager or secretary of 930 Blues Café, LLC stating who the owners are, who the managers are, who the officers are (if any) are and certifying that the attached is a true and correct copy of the certificate of formation and the current operating agreement. I need to know who can sign on behalf of the LLC and I need some kind of resolution approving the sale and authorizing Isaac to sign. I can prepare the latter document, but I need to be sure about the LLC's organization before I can. Then, I need Isaac to sign the Reaffirmation Agreement and Deed of Trust. We may also need to get a title update on the property. I am waiting to hear from our Client on that.

In this email, the obligation of the parties was clear. The Defendant 930 Blues Café, LLC (another entity formed by Mr. Byrd) agreed to pledge the property of the 930 Blues Café to secure a promise to pay the $200,000.00 required by SPCP in exchange for the release of Northgate. This email is prima facie evidence of the intention of the parties, proof of the agreement and the amount of money the 930 Blues Café Deed of Trust was to secure.

On June 25, 2008 the 930 Blues Café LLC executed a Deed of Trust to R. David Marchetti, as trustee for SPCP Group, LLC., on the 930 Blues Café property (RE 139, Exhibit 64, D-29) per their agreement. Paragraph two of the Deed of Trust stated:

> **WHEREAS, CONGRESS STREET PROPERTIES, LLC**, a Mississippi limited liability company, **NORTHGATE PROPERTIES, LLC**, a Mississippi limited liability company, **ISAAC K. BYRD JR**, an individual ("Byrd"), together with Grantor, ("the Obligors") are indebted to Beneficiary in the sum of **Two hundred Thousand Dollars and 00/100 ($200,000.00)** in lawful money of the United States, and has agreed to pay the same, without interest thereon, according to the terms of a certain Reaffirmation Agreement by and between Obligors and Beneficiary, bearing even date herewith, with the final payment being due on or before August 30, 2008, (month and day handwritten) the Agreement by reference being made a part hereof.

Also on June 25, 2008 the Congress Street Properties LLC , Northgate Properties LLC and Isaac Byrd executed a Reaffirmation Agreement (RE . Exhibit 65, D-30). In Paragraph (2), entitled *Application of Sale Proceeds to Debt; Payment of Additional Sums; Release of Property from Liens*, the Reaffirmation Agreement states:

> In addition, Obligors agree to pay to the Lender the additional sum of Two Hundred Thousand Dollars and 00/100 ($200,000.00) in cash as a credit against the indebtedness within ten (10) business days from the closing of the sale of the Property. This obligation shall be secured by a Deed of Trust on certain real property owned by 930 Blues Café, LLC in Jackson, Mississippi.

Attached to the Reaffirmation Agreement was the Corporate Resolution of the 930 Blues Café LLC authorizing its agent to sign the Agreement (RE 133, Exhibit 66, D-31) . This Resolution states that the intended amount of the debt to be secured by the 930 Blues Café property was $200,000.00 and that alone was the maximum amount Mr. Byrd was authorized to encumber. Specifically, the

resolution states:

> RESOLVED, that real and personal property of the LLC be pledged to secure the payment of $200,000.00 to SPCP Group, LLC, in exchange for their release of certain real property owned by the LLC's affiliated Company; and
>
> RESOLVED FURTHER, that the Manager, Isaac K. Byrd, Jr., shall be, and hereby is, authorized to execute such documents and perform such acts as may required to consummate the transaction on behalf of the LLC, including, but not limited to, the Reaffirmation Agreement and Deed of Trust in substantially the form as attached hereto as Exhibits "A" and "B".

The "Obligors" in the Reaffirmation Agreement included Congress Street Properties, Northgate Properties, and Mr. Byrd. The "Obligors" did not include 930 Blues Café LLC. The "Obligors" were those entities who owed money to SPCP and against whom SPCP had obtained a judgment. SPCP had not obtained any judgment against the 930 Blues Café LLC. Thus, paragraph 3 of the Reaffirmation Agreement entitled "Reaffirmation of the Indebtedness by the Obligors" did not and could not cover the 930 Blues Café LLC.

On September 22, 2008 the $200,000 payment was made (RE 150, Exhibit

9,

vol.1 of 2). BMR even admitted in its Answer to the Counterclaims that the $200,000 was paid. (R.000140) Despite this payment, SPCP continued to press Mr. Byrd with demands for further payments which he thought were for late fees or something. (RE 89, Mr. Byrd's affidavit). SPCP threatened foreclosure on both the 939 N. President deed of trust, that Mr. Byrd did not know was void, and the 930 Blues Café. Eddie Abdeen negotiated several postponements of the threatened foreclosures (R.000386-415) and Mr. Byrd paid an additional $150,000 over the ensuing months. BMR argued that these payments are proof that the 930 Blues Café deed of trust was intended to encumber the entire judgment amount and not just the $200,000, saying "actions speak louder than words". However, better proof of the intent of the parties is their specific words, (such as the Marchetti e-mail, Holtzman's letter and the corporate resolution) at the time of the execution of the deed of trust, rather than actions of one party months later.

On December 15, 2008 SPCP substituted Jeremy L. Retherford in the place and stead of Marchetti as the trustee on the 930 Blues Café deed of trust. On March 15, 2009 SPCP assigned the deed of trust to BMR. On June 9, 2009 Retherford claimed to proceed with the foreclosure in Jackson, Ms. executing a substitute trustee's deed in Birmingham, Alabama, and conveying the property to

BMR Funding for $150,000.00 at a foreclosure sale (Exhibit 16, vol.1 of 2).

Summary of Argument

This case involves the validity of two deeds of trust that were the basis for BMR Funding's foreclosure. The first deed of trust, on 939 N. President and 933 N. President, is invalid because it was materially altered after execution. These two parcels are separate and distinct and the proof showed that only the 939 N. President property was intended to be used as collateral for the loan. The Deed of Trust recites the address as collateral, and while reference is made to an Exhibit A with a legal description, no Exhibit A was attached to the deed at the time it was executed and delivered. After recording this instrument, the original was re-recorded with an Exhibit A attached that listed both properties as collateral. To attach Exhibit A and simply re-record the deed of trust materially altered it by adding new collateral without any ratification of Congress Street Properties. Under *Mullins v. Merchandise Sales, Co,* 192 So.2d 700 (1966) and *Merchants' & Farmers' Bank v. Dent,* 102 Miss. 455, 59 So. 805 (1912), this materially altered deed of trust voided it at the time of re-recording. Thus, there can be no valid foreclosure trustee's deed if there were no valid deed of trust.

The Trial Court also erred in find a deed of trust executed by 930 Blues Café, LLC, the Trial Court to be enforceable as well. The proof in the record

shows that this Deed of Trust secured a $200,000 obligation which was paid off. At the time of payment, title automatically revested to the 930 Blues Café and the trustee had no valid instrument on which to foreclose as well.

Argument

I. The Trial Court erred in finding the Congress Street Property Deed of Trust enforceable.

It is clear from the record, that when CSP purchased the properties located at 939 N. President and 933 N. President Street, it was purchasing two separate parcels of property. From the proof in the record, the original deed of trust and assignment of rents were secured only by the property located at 939 N. President, not on 933 N. President. Even if the documents were deemed to be ambiguous, the only proof of the intent of the parties to the financing agreement between CSP and SouthTrust Bank was that only one parcel, the 939 N. President property, was to be encumbered.

The Trial Court erred in failing to make a distinction between these two contracts involved when the property was purchased. The first contract was the contract of sale between Congress Street Properties and Protective Life Insurance Companies. The second contract was the financing contract between Congress Street Properties and SouthTrust Bank. The documents of the first contract (the closing statement, etc) are not relevant to show the intent of the parties to the

second contract, the financing contract.

The Deed of Trust is a document showing the intent of the parties to the second contract, this financing agreement. Exhibit A to that Deed of Trust may have been referenced in the description of the collateral, but even the Trial Court found that Exhibit A was not attached to the deed of trust when it was recorded; this is true, but more importantly, in the absence of any proof to the contrary, Exhibit A was also not attached at the time the deed of trust was *signed*. This is undisputed, as the originally recorded deed of trust did not have Exhibit A attached. The Court then failed to find that this Exhibit A was attached to the original deed of trust **after** the original was signed, and re-recorded without obtaining the consent or agreement from CSP that what was included in Exhibit A's description, was in fact the property to be encumbered. There is no evidence to the contrary in the record. Thus, the Trial Court erred in failing to find as fact that Exhibit A was attached after the execution and recording of the original deed of trust. .

The Trial court also erred in finding that the parties to the deed of trust intended the both properties to be encumbered because the property described in Exhibit A and later attached, was the same as on the deed to the property. There is no proof at all of whether there even existed an Exhibit A at the time of the original

execution, an Exhibit A that both CSP and SouthTrust had agreed to, much less any proof that they intended Exhibit A to cover both 939 N. President and 933 N. President parcels (both separate and distinct).

Further the Court erred in finding that at the time of closing, CSP had executed an assignment of rents that had Exhibit A attached. In fact, the assignment of rents did not have Exhibit A attached either as shown by original filing. If it had, then Exhibit A would also have been recorded. But the assignment of rents was also rerecorded, again without the knowledge or consent of CSP, with Exhibit A attached later. The original deed of trust was recorded in Bk. 5569, Pg. 113; and the assignment of rents was recorded in Bk. 5565, Pg. 767. The *rerecorded* deed of trust was recorded in Bk. 5590, Pg. 145, and the assignment of rents was recorded in Bk. 5587, Pg. 720. Therefore, at the time of the execution of the original deed of trust and assignment of rents, there was no Exhibit A attached, and there was no proof in the record to show that SouthTrust Bank and CSP intended to have the legal description from the purchase of both parcels included in Exhibit A to these financing documents.

Even under the standard of clear and convincing evidence, CSP showed that the original deed of trust was altered and void. The Trial Court correctly cited *Mullins v. Merchandise Sales, Co,* 192 So.2d 700 (1966) as a case on point;

however, the Court misunderstands its holding. There the Court found that:

> The fraudulent alteration of the deed of trust by including therein additional property after delivery rendered it void, as in *Merchants' & Farmers' Bank v. Dent,* 102 Miss. 455, 59 So. 805 (1912) we held as follows:
> Because of the unwarranted changing of the deed in trust, it became void and of no effect. The original instrument executed by appellees was in reality destroyed. It was not the paper which they signed and delivered. The appellants have no rights thereunder. It is the rule of law that the material alteration avoids the instrument.

Mullins, at 703.

Thus the *Mullins* Court held that it is the inclusion of additional property after delivery that make an alteration fraudulent. In *Hughes v. Hahn,* 46 So.2d 587, 590 (Miss.1950), this Court also held that the validity of a deed of trust is judged by the circumstances existing *at the time of its execution.* In this case, delivery occurred at the one and only time that CSP executed the Deed of Trust. The re-recording of the same original once without an Exhibit A, and later with Exhibit A, is clear proof that Exhibit A was added after delivery. There is no proof in the record at all that the addition of Exhibit A was a mistake or mere omission; there is no proof in the record to rebut Mr. Byrd's testimony that all property in Exhibit A was not intended to be included in the collateral for the deed of trust. To include additional property after the delivery of the deed of trust, under *Mullins*, voided that deed of trust.

By adding the warranty deed legal description these *same originals* as were

filed on May 9, 2002, now had added to them as collateral the property at 933 N. President St., which was not part of the deed of trust, and which further contradicted the plain language of the promissory note, and the security instrument itself. The original deed of trust was modified and a material change was made to it.

Because it was not the same instrument executed by CSP on 04/29/2002, the new instrument required a new acknowledgment , which it did not have. Citing, *Merchant & Farmers Banks v. Dent,* 102 Miss. 455., 59 So. 805 (1916), the Court in *Mullins v. Merchandise Sales, Co.,* 192 So.2d 700 (Miss. 1966) held that an alteration of deed of trust to include 100 acres not originally specified in the deed of trust rendered such deed of trust void in its entirety. The debtor did not know of the alteration and did not consent to it. The Court said the original instrument executed by the mortgagors was in reality destroyed; it was not the paper they signed. "It is the rule of law", the Court said, "that the material alteration voids the instrument". In *Home Security Corporation v. Gentry,* 223 So. 2d 249 (Miss. 1970) the Court voided a deed of trust void when debtor was told one acre would be taken as collateral but instead thirty-five acres were taken. See also *Jordan v. Warren*, 602 So.2d. 809 (Miss. 1992) (erasure or interlineations

voids a deed of trust if done after delivery of same).[4]

Further, in the *Home Security* case, the Court not only set aside and cancelled the deed of trust, it voided the substituted trustee's deed that was obtained after to a foreclosure. BMR here has insisted that CSP's failure to act prior to the foreclosure precluded it from raising a challenge after. However, in this case, the debtor did not learn of the erroneous inclusion of property not intended to be part of the deed of trust until litigation over title to the property began post-foreclosure. (See affidavit of Mr. Byrd, Exhibit 1, subpart 14)

Moreover, the procedural posture of this case is similar that in *Home Security*, in that a substituted trustee foreclosed on the property pursuant to a void deed of trust. A trustee can only convey the interest conveyed to him. Here, because the deed of trust was altered, and thus voided, then no valid interest in the property was ever conveyed to the Substitute Trustee. Because the alteration of the deed of trust made it void, the substituted trustee had no valid instrument on which to foreclose and the trustee's deed to the 939 N. President property should have

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[4]Furthermore, the Court notes that Miss. Stat. 75-3-407, though dealing with negotiable instruments, is still instructive as to what is considered an "alteration". That statute defines an "alteration" as:

a) "Alteration" means (I) an unauthorized change in an instrument that purports to modify in any respect the obligation of a party, or (ii) an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party.

been set aside.

The case is similar to *Craddock v. Brinkley,* 671 So.2d 662 (Miss. 1996), where the this Court upheld a Trial Court's setting aside of a foreclosure sale when it found the deed of trust on homestead property void because the wife had not signed it, saying "the instrument was null and void and since it was that instrument that was used as the basis of the foreclosure, the chancellor appropriately set aside the foreclosure."

This re-recording of the original deeds of trust without CSP's written Agreement even violated the very terms of the original deed of trust which specifically stated:

> **Amendments**. This Deed of Trust, together with any related documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Deed of Trust. *No alteration or amendment to this Deed of Trust shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment. (Emphasis added)*

Miscellaneous Provisions: p. 5

The original deed of trust did not have any legal description included in it. When Young-Williams and SouthTrust sought to add a legal description to the

Deed of Trust, they failed to prepare a Corrected Deed of Trust. They did not obtain a new execution of a Corrected Deed of Trust by CSP or even a ratification in writing the time of the refiling from CSP as required by the terms of the deed of trust itself. Moreover, the refiled Deed of Trust failed to contain an explanation for the "correction". Finally, the refiled Deed of Trust included the legal description for 933 N. President, and therefore included property that was never intended to be covered by the Deed of Trust.

Nor is CSP stopped from challenging title because of the courtesy letter sent to him with a copy of the re-recorded deed of trust. The Court acknowledged that Mr. Byrd, testifying by affidavit, said that he did not intend to encumber the 933 N. President parcel, but only the 939 N. President property. But the court goes on to discount this testimony and give it no credence when there is no proof in the record to establish that SouthTrust had intended anything different. If the Court is to establish the intent of the parties, and there is testimony of one and only one party, it is clear error for the Court to infer the intent of SouthTrust Bank was different when there is no contrary proof of SouthTrust's intent in the record at all. The fact that Mr. Byrd received a courtesy copy of the re-recorded deed of trust after the fact does not constitute a ratification and is irrelevant to the validity of the deed of trust that had clearly been altered.

Nor is CSP is estopped from challenging title because of the Forbearance Agreements and Reaffirmation Agreements CSP signed. It is clear that CSP did not know about the invalidity of the 939 N. President deed of Trust and thus it never knowingly and voluntarily agreed to reaffirm the corrections. Moreover, in *Craddock,* 671 So.2d 662,665, where it was argued that the wife subsequently signed a promissory note affirming the indebtedness, the Court said that the validity of a deed of trust is judged by the circumstances at the time of the execution and subsequent actions to validate it do not cure the defects. In this case, at the time of the alteration of the deed of trust, in June 2002, the 939 N. President deed of trust became void and could not be revived.

The Trial Court ignored the uncontradicted affidavit of Jarrett Nichols, (RE 139), a real estate attorney with extensive experience in loan closings and the preparation of deeds of trust. He gives his opinion, based on the evidence, that the Deed of Trust was materially altered and void.

Accordingly, the deed of trust on the 939 N. President Street became void at the time of its alteration without the consent of CSP and therefore, the Substitute Trustee's deed by signed by Mr. Rutherford at the time of the foreclosure conveyed no interest to BMR. The Trial Court erred in failing to set aside the 933 N. President trustee's deed and confirm CSP's title to said property.

II. The Trial Court erred in finding the 930 Blues Café LLC Deed of Trust had not been satisfied and thus was enforceable.

The Trial Court clearly erred in determining that the 930 Blues Café Deed of Trust collateralized more than $200,000. The Court's recitation of the facts surrounding the execution of the 930 Blues Café Deed of Trust is unclear and mistakenly finds that Mr. Byrd had a prior obligation owed to BMR concerning the 930 Blues Café property or that Mr. Byrd was purchasing or selling the 930 Blues Café property when the Reaffirmation Agreement contemporaneously signed with the Deed of Trust was signed. While it is undisputed that there was a prior judgment on debts owed and deeds of trust BMR held on property owned by CSP and Northgate Properties, LLC, this judgment was not against 930 Blues Café LLC and BMR held no deed of trust on the 930 Blues Café, LLC at the time of the federal court judgment.

Northgate Properties desired to sell its property to help reduce this judgment and asked BMR to release it so the sale could go through. BMR agreed, but because the sale price would not fully reduce the debt owed by Northgate Properties, BMR required an additional $200,000 payment secured by other property before it would release the Northgate Property for sale. It is clear from the record that the "other property" pledged was the 930 Blues Café property. The

Reaffirmation Agreement, then, was signed clearly only to release the Northgate property and the fact that the Reaffirmation Agreement did not include the release of the 930 Blues Café property is misleading.

The Trial Court held that the language of the Deed of Trust was clear and unambiguous in securing "the full indebtedness" (though it is unclear as to whose "full indebtedness" the Court is referring). The Trial Court cites the following language from the Deed of Trust:

> Grantor (930 Blues Café, LLC) is executing this Deed of Trust to secure the following...
> Payment of Two Hundred Thousand and 00/100 dollars ($200,000) required under the Reaffirmation Agreement, and any and all debts, obligations or liabilities, direct or contingent, of the Obligors of any of them to the Beneficiary ...and other amounts due and payable or which may become due or payable under this Deed of Trust, the Reaffirmation Agreement or any other agreement between Grantor and Beneficiary...

There is no definition in the Deed of Trust for who the "Obligor" is, therefore, the Court had to interpret the Deed of Trust relying on the language of the Reaffirmation Agreement. Yet the Court cites only one provision of the Reaffirmation Agreement–that the $200,000 is a partial credit against this indebtedness", without referring to what the indebtedness is or whose indebtedness it was. The Trial Court failed to cite the specific provision of the Reaffirmation Agreement that deals with the extent of the debt that the 930 Blues Café property

was to secure, including:

> **WHEREAS, CONGRESS STREET PROPERTIES, LLC**, a Mississippi limited liability company, **NORTHGATE PROPERTIES, LLC,** a Mississippi limited liability company, **ISAAC K. BYRD JR**, an individual ("Byrd"), together with Grantor, ("the Obligors") are indebted to Beneficiary in the sum of **Two hundred Thousand Dollars and 00/100 ($200,000.00)** in lawful money of the United States, and has agreed to pay the same, without interest thereon, according to the terms of a certain Reaffirmation Agreement by and between Obligors and Beneficiary, bearing even date herewith, with the final payment being due on or before August 30, 2008, (month and day handwritten) the Agreement by reference being made a part hereof.

And under Paragraph (2), entitled *Application of Sale Proceeds to Debt; Payment of Additional Sums; Release of Property from Liens*, the Reaffirmation Agreement states:

> In addition, Obligors agree to pay to the Lender the additional sum of Two Hundred Thousand Dollars and 00/100 ($200,000.00) in cash as a credit against the indebtedness within ten (10) business days from the closing of the sale of the Property. This obligation shall be secured by a Deed of Trust on certain real property owned by 930 Blues Café, LLC in Jackson, Mississippi.

Attached and thus a part of the Reaffirmation Agreement was the Corporate Resolution of the930 Blues Café LLC authorizing its agent to sign the Agreement. This Resolution states that the intended amount of the debt to be secured by the 930 Blues Café property was $200,000.00 and that alone was the maximum amount Mr. Byrd was authorized to encumber. Specifically, the resolution states:

> RESOLVED, that real and personal property of the LLC be pledged to secure the payment of $200,000.00 to SPCP Group, LLC, in

exchange for their release of certain real property owned by the LLC's affiliated Company;

If the Court included, as it must, the provisions of the Reaffirmation Agreement to interpret the 930 Blues Club Deed of Trust, then there was clearly conflicting language, making it no longer clear and unambiguous as to the extent of the debt.

The Trial Court then went on to cite Mr. Byrd's payments after the $200,000 was paid as proof that the Deed of Trust was intended to cover more. However, the evidence that the Deed of Trust was limited solely to cover the $200,000 is stronger, including the Marchetti e-mail (BMR's attorney) and other contemporaneous correspondence, not to mention the Corporate Resolution. The weight of the evidence is clearly in favor of a finding that the 930 Blues Café Deed of Trust secured only $200,000 and when paid, it extinguished, by law, that obligation. When the $200,000 debt was paid, BMR was obligated to release and Discharge the Deed of Trust under Mississippi law:

89-5-21. Entry of satisfaction upon record of mortgage or deed of trust

(1) Except as otherwise provided in this subsections (3), (4) and (5), any mortgagee or cestui que trust, or assignee of any mortgagee or cestui que trust, of real or personal estate, having received full payment of the money due by the mortgage or deed of trust, shall enter satisfaction upon the margin of the record of the mortgage or deed of trust, which entry shall be attested

by the clerk of the chancery court and discharge and release the same, and shall bar all actions or suits brought thereon, and the title shall thereby revest in the grantor.

Accordingly, when the $200,000 was paid, title to the 930 Blues Café property immediately revested to the 930 Blues Café and there was no enforceable deed of trust to assign to BMR or foreclose upon.

The Trial Court erroneously held that that the property was pledged for other amounts because it said the Deed of Trust references the Reaffirmation Agreement. However, as noted above, the Reaffirmation Agreement does not obligate the 930 Blues Café LLC to any debt, so the Deed of Trust on its property cannot cover any amounts in the Reaffirmation Agreement other than the $200,000 specifically named.

Moreover, any argument that the Deed of Trust's "dragnet clause" covered the judgment amount fails as well. Not only was there no antecedent debt owed by the 930 Blues Café LLC, the Court finds that the dragnet clause in the deed of trust in this case is boilerplate and unenforceable. This Court has held that "dragnet clauses" or 'anaconda clauses" may be enforceable, but only if properly executed and stated in clear and unambiguous language. *Kelsa v. McGowan,* 604 So.2d 726 (Miss. 1992). In *Merchants National Bank v. Stewart*, 608 So. 2d 1120 (Miss.

1992) the Court established the rule that known antecedent debts will not be within the reaches a dragnet clause unless they are specifically identified in the instrument. In the case at hand, if the dragnet clause was to secure the prior federal judgment, it should have so stated and the Reaffirmation Agreement should have been included language by which the 930 Blues Café LLC agreed to become an Obligor and take on the obligation of the judgment. It did not, and all other contemporaneous documents show that the deed of trust was intended to secure only the $200,000 debt that was paid. For the Trial Court to have found that the 930 Blues Café Deed of Trust was not satisfied when the $200,000 was paid, was clear and reversible error.

Conclusion

For the above and foregoing reasons, the Opinion of the Trial Court should be reversed and judgment granted for the Appellants

Respectfully submitted, this 16 day of March, 2011.

CONGRESS STREET PROPERTIES, LLC
AND 930 BLUES CLUB, LLC
Appellants

By: Suzanne Keys

Suzanne Keys, Esq.
Attorney for 930 Blues Café, LLC.,
and Congress Street Properties, LLC.

CERTIFICATE

I, Suzanne Keys, attorney for Congress Street Properties, LLC and 930 Blues Café, LLC hereby certify that I have caused to be mailed by U.S. Mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellants to the Trial Court and attorneys for the Appellee, BMR Funding, LLC. on this day and date:

Honorable Dwayne Thomas
Chancery Court Judge
P. O. Box 686
Jackson, MS 39205

William Smith, Esq.
Tara Ellis, Esq.
Alan Windham, Esq
Balch & Bingham L L P
Post Office Box 22587
Jackson, MS 39201

So certified this the 18 day of March, 2011.

SUZANNE KEYS