

STATE OF NORTH CAROLINA
COUNTY OF MCDOWELL

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 09-CVS- 544

PERLA CABRERA; BARRY and)
DEBORAH NELSON; GEORGE)
and BARBARA TEBBITT; CHRISTOPHER)
and LINDA TEBBITT; WADE LENDIN)
and SUSAN CUNNINGHAM; GEOFFREY)
and CLARE LEVIN; CHRISTOPHER)
MALLETT; RALPH and CYNTHIA)
MCCORMICK; KENNETH and DIANE)
NELSON; ROBERT and KEITA REID;)
JASON B. SHERMAN; RICHARD and)
MARY ELLEN COELEN; CHRISTOPHER)
and SOPHIE ONDRUS; VICTOR and)
ALLISION BARNES; CURTIS and SUSAN)
BURKETT; JOHN and ANGELINA)
DANCEL; DEBRA HUNTER NKA DEBRA)
DURANTE; GREG MURRAY; VASUDEV)
NARAYANAN and LESLIE VAN DYKE;)
KSHITIJ OBEROI and SAMYA)
BOXBERGER; RAUL P. PAVIA; DAVID and)
DAIVA STRATTON; RITA BHAT;)
WILLIAM and BEVERLY EHLEBRACHT;)
STEVEN and THERESE CECCHIN,)
Plaintiffs,)

**MEMORANDUM IN SUPPORT OF
MOTION FOR
PRELIMINARY INJUNCTION
PROHIBITING FORECLOSURE
PROCEEDINGS PENDING
DISPOSITION ON MERITS**

vs.

THE RIDGES AT MORGAN CREEK, LLC, a
Florida limited liability company,
WACHOVIA BANK, N.A.; BANK OF
AMERICA CORPORATION; BRANCH
BANKING & TRUST COMPANY (“BB&T”);
UNITED COMMUNITY BANK, N.A.;
FIRST CHARTER BANK, N.A.;
FLAGSTAR BANK, F.S.B.; JILL T.
HENSLEY; ERIC L. ROSS; NELSON EIDE;
CHRISTOPHER VAN DYKE; MOLLY
OAKMAN; CHARLES B. HIGHSMITH;
GERALD F WRIGHT; UNKNOWN
APPRAISER #1; UNKNOWN APPRAISER
#2; UNKNOWN APPRAISER #3;

UNKNOWN APPRAISER #4; UNKNOWN APPRAISER #5; UNKNOWN APPRAISER #6; UNKNOWN APPRAISER #7,

Defendants.

Consistent with the verified representations of the Motion for Preliminary Injunction, irreparable harm will result if an Injunction does not issue from this Court on an expedited basis. Specifically, the Lenders joined herein will initiate and process to conclusion power-of-sale foreclosures against the lots titled to the respective co-plaintiffs, resulting in irreparable damage to the individual creditworthiness of each, as well as their ability to seek relief from this Court in addressing the wrongs complained of. *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (“w]henver, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law”; (citing *Fulton v. City of Morganton*, 260 N.C. 345, 347, 132 S.E.2d 687, 688 (1963); *Bechtel v. Cent. Bank & Trust Co.*, 202 N.C. 855, 856, 164 S.E. 338, 338 (1932)); *Morrone v. Maitin* 164 N.C.App. 598, 596 S.E.2d 473, 2004 WL 1191669 (2004); *In re Foreclosure of Deed of Hunt*, 176 N.C. App. 407, 626 S.E.2d 875 (2006), holding that all attempts to stay a completed foreclosure sale are moot).

The Plaintiffs, through counsel, have sent validation letters pursuant to 15 U.S.C. Section 1692(g) to the Defendant Lenders in each and every instance, intended to apprise them as to the pendency of the dispute and to request that they desist communication and collection efforts except through counsel. A true and accurate exemplar of these letters is attached as exhibit F and made a part hereof by this reference.

This notwithstanding, the Lenders in some instances have persisted in collection efforts. A true and accurate exemplar of such correspondence is attached as exhibit G and made a part hereof by this reference.

Accordingly, the Plaintiffs have tried, through less formal means, to achieve a temporary resolution tantamount to a “stand-still” agreement pending the resolution of issues identified herein, which are based upon the allegations of the Complaint. To date, these efforts are unavailing.

This Court has authority to stay the prosecution of foreclosures where a good faith dispute is pending, and where irreparable harm would otherwise result. Ordinarily, to justify issuing a preliminary injunction, the movant must show (1) there is probable cause to believe that plaintiff will be able to establish the right he asserts, and (2) there is reasonable apprehension of irreparable loss unless interlocutory injunctive relief is granted or unless interlocutory injunctive relief appears reasonably necessary to protect plaintiff's rights during the litigation. *Carefree Carolina Communities, Inc. v. Cilley* 79 N.C.App. 742, 340 S.E.2d 529 (1986)(Citing *Setzer v. Annas*, 286 N.C. 534, 212 S.E.2d 154 (1975)).

In this case the Plaintiffs have set forth in reasonable detail the basis for the allegations made, the theories of relief sought, and documentation reflecting probable cause that the Plaintiffs will be able to assert a meritorious case. This includes documentation reflecting:

1. An appraisal of the property exemplary of others that, under the circumstances, contains unreasonable assumptions of value based on premises of infrastructural development that were patently false even when the appraisals were being rendered. Exhibit A;
2. A definitive schedule of development that was already seriously in arrears – and in fact nonexistent -- as of the time that lot sales were being transacted. Exhibit B;

3. A reference by the Developer, in its literature, to certain preferred lenders and even points of contact with those lenders reflecting a degree of intimacy between the Developer and four of the Lenders joined herein, giving rise to a reasonable inference that these individuals had superior knowledge concerning the status of the development, or lack thereof. Exhibit C;
4. The insolvent status of the lender including subsidiary limited liability companies with whom the Lenders had worked in financing developments in varying stages of incompleteness. Exhibit D; and
5. Sales information on the remaining lots sold for less than *one percent* (1%), on average, of the prices paid by the Plaintiffs. Exhibit E.

The decision to issue or not to issue a preliminary injunction is usually a matter of discretion to be exercised by the trial judge and will not be overturned absent a showing of an abuse of discretion. *Carefree Carolina Communities, Inc.* at 743, 530 (Citing *Pruitt v. Williams*, 288 N.C. App. 368, 218 S.E.2d 348 (1975)). See also *Little v. Stogner*, 140 N.C.App. 380, 536 S.E.2d 334 (2000).

On the other hand, where irreparable harm would otherwise result, to deny injunctive relief otherwise resulting in foreclosure may give rise to an interlocutory appeal for abuse of discretion. *Superscope, Inc. v. Kincaid* 56 N.C.App. 673, 289 S.E.2d 595 (1982) (holding that where Plaintiff would otherwise have to redeem the property in the amount of the contested balance would result in irreparable harm). As stated in *Superscope*:

Where an injunction is sought to restrain the sale of property upon a deed of trust or other lien, and there is a serious controversy as to default or the amount due, the courts in North Carolina have generally continued the injunction to the final hearing.” (Citing *Realty Corp. v. Kalman*, 272 N.C. 201, 159 S.E.2d 193 (1967);

Smith v. Bank, 223 N.C. 249, 25 S.E.2d 859 (1943); *Teeter v. Teeter*, 205 N.C. 438, 171 S.E. 620 (1933); *Wentz v. Land Co.*, 193 N.C. 32, 135 S.E. 480 (1927); *Sanders v. Insurance Co.*, 183 N.C. 66, 110 S.E. 597 (1922); 9 Strong's N.C.Index 3d *Mortgages and Deeds of Trust* § 19.5 (1977)); *Id.* at 677, 597.

WHEREFORE, the Plaintiffs pray that the Court enter an order prohibiting the foreclosure of the respective lots owned by the co-plaintiffs herein, as indicated in the Complaint, or any collection efforts that the Defendant Lenders could otherwise assert as to those lots. The Plaintiffs further pray that the Court grant any and all additional relief, which in its discretion, may be just and equitable, including a requirement that the Plaintiffs' each post a bond reflecting the true value of the lots in their undeveloped state, respectively, on a per plaintiff basis, as reflected by the \$932.40 average value established by the recent sale as referenced.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with Local Rule requiring content not to exceed 7,500 words.

Respectfully submitted this the 28th day
of August, 2009:

/s/ Austin N. Aaronson
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and accurate copy of the foregoing has been served this 28th day of August 2009 to:

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