

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

HOMEcomings FINANCIAL)
NETWORK, INC., a corporation,)

Plaintiff,)

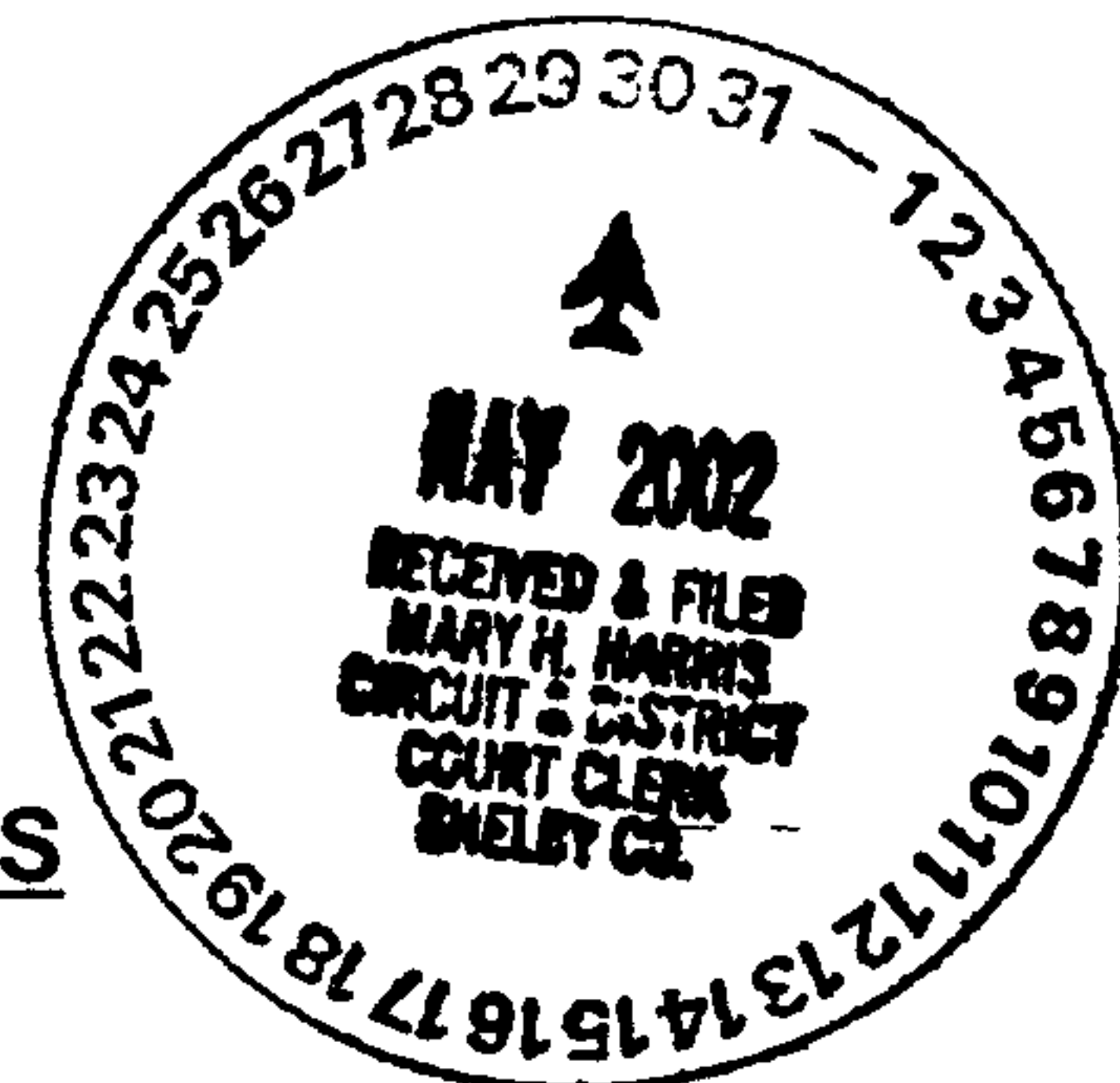
v.)

CIVIL ACTION NO. CV-2001-083

THE 113 WINDSOR CIRCLE TRUST;)
HOWARD GRANT DUNNAM, JR., not)
personally, as Trustee; et al.,)

Defendants.)

JUDGMENT BY DEFAULT ON CROSS-CLAIMS



This cause is before the Court on the Motion for Default Judgment on Cross-Claims filed by defendants and cross-claimants Derrick Ervin and Shemelia Ervin ("Ervins") against cross-claim defendants The 113 Windsor Circle Trust, Howard Grant Dunnam, Jr., not personally, as Trustee ("Trust") and Howard Grant Dunnam, Jr. ("Dunnam") filed herein on September 26, 2001. The Court finds that the Trust and Dunnam have been duly served by publication and, therefore, have notice of the Ervins' cross-claims against them. Additionally, the Court notes that the Ervins attempted personal service on the Trust and Dunnam, even after completion of service by publication, when this Court advised counsel for the Ervins that the Trust and Dunnam were parties before the Court in another action, and counsel for the Ervins thereafter attempted, unsuccessfully, service by certified mail at the post office box referenced on correspondence from Dunnam to the Court in the other action. The Court finds that the Trust and Dunnam, despite service and notice of the cross-claims, have failed to plead or otherwise defend as provided by the *Alabama Rules of Civil Procedure* and,

570740.1

✓
Carol L. Latham
181 West Valley Ave. Ste 101
Homewood, AL 35209

therefore, that the Ervins are entitled to judgment in their favor pursuant to Rule 55, *Ala. R. Civ. P.*

Taking the allegations of the cross-claims as true, and based further on the testimony of the Ervins in open court on May 30, 2002, the Court finds as follows:

1. Prior to September 29, 2000, the Ervins entered into negotiations with Dunnam and the Trust for the purchase of a house and lot known as Lot 4, Weatherly Windsor, in Shelby County, Alabama, which led to an agreement by the Ervins to purchase said property for the sum of \$400,000, subject only to a purchase money mortgage to be held by the Trust.

2. On September 29, 2000, Dunnam, on behalf of the Trust, executed a general Warranty Deed of the following property to the Ervins:

Lot 4, according to the Survey of Weatherly Windsor Sector 9, as recorded in Map Book 17, Page 125, in the Probate Office of Shelby County, Alabama (hereinafter "Subject Property").

3. Simultaneously with the execution of this deed from the Trust to the Ervins, the Ervins executed a promissory note in favor of the Trust, and also a purchase money mortgage of the Subject Property to the Trust, in the principal amount of \$380,000, upon the representation by Dunnam and the Trust that this would be the only mortgage lien on the Subject Property, other than a \$25,000 mortgage from the Trust to First Choice Funding, Inc., recorded on May 16, 2000, for which Dunnam agreed to be responsible.

4. At no time prior to the execution of these instruments did Dunnam or the Trust ever disclose to the Ervins that Homecomings Financial Network, Inc. ("Homecomings") claimed a mortgage on the Subject Property, even though Dunnam and the Trust knew, or

should have known, that such claim would be a material fact affecting the Ervins' willingness and agreement to enter into the transaction.

5. The Ervins, in good faith and for valuable consideration, purchased the Subject Property from the Trust, as a result of Dunnam's and the Trust's fraudulent representation concerning the status of title, or fraudulent suppression of the material fact that Homecomings claimed a mortgage upon the Subject Property, and under circumstances that imposed a duty of disclosure to the Ervins by Dunnam and the Trust of that claim.

6. Homecomings has filed the instant action, seeking to impose a mortgage lien on the Subject Property.

7. The Trust and Dunnam intentionally, wantonly or negligently misrepresented the true status of title to the Subject Property to the Ervins, or intentionally or wantonly suppressed material facts relating to the status of the title of the Subject Property, as a result of which the Ervins were damaged by their entering into the purchase agreement for the Subject Property from the Trust, and their subsequent execution of a \$380,000 promissory note and mortgage securing same to the Trust.

8. The note and mortgage executed to the Trust by the Ervins were procured by fraudulent representation, suppression of material facts, or under other circumstances that would make it inequitable to allow the Trust and Dunnam to enforce same, and which would support their cancellation.

9. The Court has been informed that Homecomings and the Ervins have entered into a settlement arrangement by which the Ervins, through a mortgage loan from

Homecomings or another entity, will satisfy and procure release of the mortgage that Homecomings is seeking to enforce against the Subject Property.

10. Because the Court is satisfied that Homecomings and the Ervins, who are innocent of wrongdoing, have resolved their differences, and that the Ervins will become indebted to, and will execute a new mortgage of the Subject Property to, Homecomings or another entity, the Court finds that the promissory note executed by the Ervins to the Trust in the amount of \$380,000, which was procured by fraud and under circumstances that would unjustly enrich the Trust, is due to be cancelled, set aside, and held for naught, and that the mortgage executed by the Ervins to the Trust on September 29, 2000, and recorded as Inst. #2000-36468 in the Probate Office of Shelby County, Alabama, which likewise was procured by fraud and under circumstances that would unjustly enrich the Trust, is also due to be cancelled, set aside, and released as a mortgage against the Subject Property.

11. The Court has heard testimony from the Ervins regarding the injuries and damages they have suffered as a result of the conduct of the Trust and Dunnam, including the incurring of substantial attorney's fees and expenses, worry, anxiety, loss of sleep, and other mental distress and anguish, and finds that the Ervins are entitled to an award of compensatory damages against the Trust and Dunnam for such injuries and damages in the amount of Five hundred thousand Dollars (\$ 500,000⁰⁰).

Accordingly, it is ORDERED, ADJUDGED and DECREED as follows:

1. That the promissory note in the principal amount of \$380,000, executed by the Ervins to the Trust on September 29, 2000, be, and the same hereby is CANCELLED, SET ASIDE, and HELD FOR NAUGHT; and

2. That the mortgage executed by the Ervins to the Trust on September 29, 2000, as recorded as Inst. #2000-36468 in the Office of the Judge of Probate of Shelby County, Alabama, be, and the same hereby is CANCELLED, SET ASIDE, and RELEASED as a mortgage against the following property:

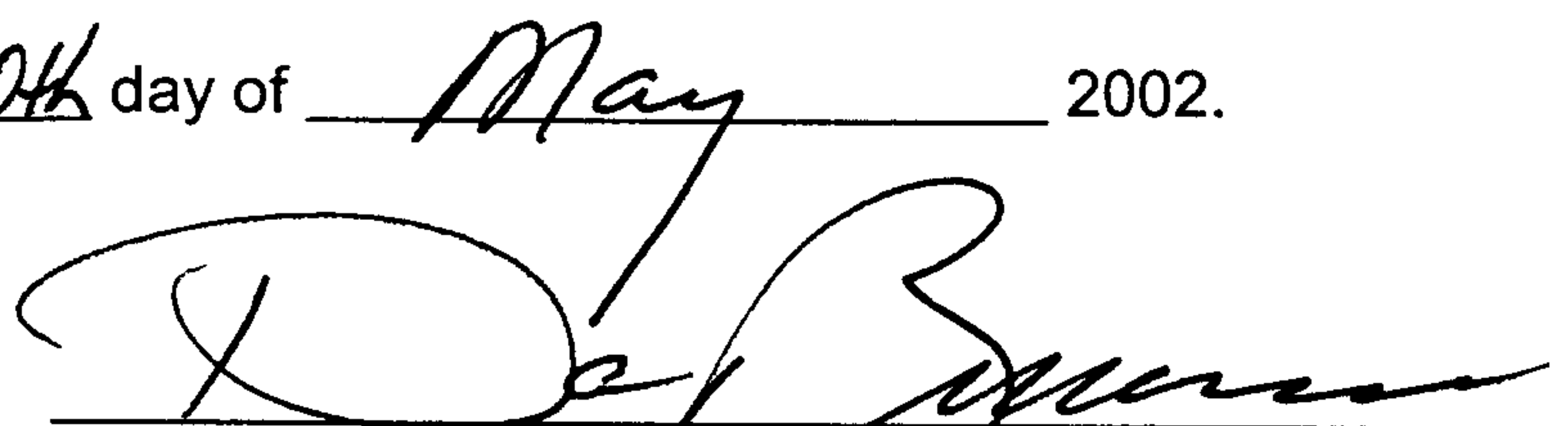
Lot 4, according to the Survey of Weatherly Windsor Sector 9, as recorded in Map Book 17, Page 125, in the Probate Office of Shelby County, Alabama,

and that a copy of this Judgment be recorded in the Office of the Judge of Probate of Shelby County, Alabama, to operate as a release of record of this mortgage.

3. That a judgment in the amount of \$500,000⁰⁰ Dollars (\$) be, and the same hereby is, RENDERED in favor of the Ervins and against the Trust and Dunnam, jointly and severally, for the injuries and damages suffered as a proximate result of the fraudulent conduct of the Trust and Dunnam, for which execution may issue; and


4. That court costs incurred by the Ervins be taxed against the Trust and Dunnam.

DONE and ORDERED this 30th day of May 2002.


CIRCUIT JUDGE

Certified a true and correct copy

Date: 10-9-02


Mary H. Harris, Circuit Clerk
Shelby County, Alabama