THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2011-CP-22-01330

Appellate Case No. 2013-000384

Branch Banking and Trust Company, ... Respondent,

vs.

P. Jason Luquire..... Appellant.

INITIAL BRIEF OF RESPONDENT

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July 29, 2013

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FACTUAL BACKGROUND

In 2007, Luquire wanted a loan of at least $250,000 from BB&T. He requested that his wholly owned limited liability company, "Indigo Limited, LLC," be the borrower. *Tr. p. 12, l. 15 – p. 14, l. 2.*

At the loan closing, Indigo Limited, LLC was represented by the attorney Luquire had retained for other commercial endeavors. *Tr. p. 28, l. 7 – p. 29, l. 9; p. 33, l. 22 – p. 35, l. 2; p. 36, l. 18 – p. 38, l. 4; p. 55, l. 15-17.* As a member and manager, Luquire executed numerous documents on behalf of Indigo Limited, LLC including a promissory note and a mortgage encumbering the lot. *Tr. p. 15, l. 1-4; p. 16, l. 9 – p. 17, l. 14; p. 57, l. 13-25; Plt. Exh. 1, 9, 10, 11.* The same date of the loan closing, Luquire executed a corrective deed transferring the property used to secure this loan to "Indigo Limited, LLC." *Tr. p. 27, l. 5 – p. 28, l. 9; Tr. p. 55, l. 24 – p. 56, l. 15; Plt. Exh. 8.* Thus, Luquire was quite intentional in his design to secure the loan with property owned by Indigo Limited, LLC. Luquire also executed an unlimited guaranty, assuming personal liability for all amounts owed to BB&T by Indigo Limited, LLC. *Amended Answer ¶ 2 admitting Amended Complaint ¶ 7, Plt. Exh. 2; Tr. p. 15, l. 5-12.*

Luquire received the $250,000 in loan proceeds and invested those loan proceeds in another real estate venture unrelated to Indigo Limited, LLC. *Tr. p. 18, l. 9- p. 19, l. 11.* Luquire made monthly interest only payments on the loan as required for its one year duration. *Tr. p. 18, l. 2-8; p. 20, l. 19-22.*

At the maturity of the promissory note in 2008, Luquire requested that BB&T extend the note. *Amended Answer ¶ 2 admitting Amended Complaint ¶ 4.* Luquire executed a modification of the promissory note on behalf of "Indigo Ltd., LLC."

Amended Answer ¶ *8.* The mortgage on the property owned by Indigo Limited, LLC continued in force. Luquire executed another personal guaranty thereby incurring responsibility to pay BB&T amounts owed by Indigo Ltd., LLC. *Amended Answer* ¶ *10; Plt. Exh. 4.* In other executed loan documents, Luquire represented that Indigo Ltd., LLC was a valid entity and used the same taxpayer identification number as he had provided for Indigo Limited, LLC one year earlier. *Tr. p. 41, l. 2 – p. 43, l. 22; Plt. Exh. 11, 12, 13.* Luquire continued to make, or caused to be made, interest only payments for the subject loan. *Tr. p. 24, l. 10 – p. 25, l. 25.* BB&T extended the loan again in 2009.

In February 2010, Luquire wrote to BB&T seeking an extension of the loan. Luquire interchangeably acted on behalf of Indigo Limited, LLC and Indigo Ltd., LLC, as if Limited and Ltd. were the same entity. *Tr. p. 38, l. 5 – p. 40, l. 5; Plt. Exh. 17.* BB&T did not agree to an extension. *Tr. p. 26, l. 4-9.*

BB&T commenced a foreclosure action June 16, 2010 against Indigo Limited, LLC. Luquire was not a party to the foreclosure action. Luquire was aware of the suit and retained counsel to defend Indigo Limited, LLC. *Tr. p. 31, l. 14 – p. 32, l. 11.* There was no filed opposition to the claims against Indigo Limited, LLC. *Tr. p. 78, l. 15-17.*

By email dated October 5, 2010, counsel for Luquire advised BB&T's foreclosure attorney that, contrary to the corrective deed Luquire signed and recorded, Indigo Limited, LLC was not the rightful owner of the secured property. *Tr. p. 77, l. 3-21; p. 89, l. 17 – p. 90, l. 2; Def. Exh. 6.* The "warning" advised BB&T not to proceed with the foreclosure sale ordered by the Georgetown County Master-in-Equity. BB&T nevertheless proceeded with the foreclosure sale on the secured property and a deficiency judgment was entered against Indigo Limited, LLC on December 21, 2010. *Amended*

Answer ¶ 2 admitting Amended Complaint ¶ 5-6. Luquire is certain he made no further installment payments on the loan. *Tr. p. 32, l. 20-24.*

On October 17, 2011, BB&T commenced this action seeking to recover only the deficiency judgment amount against Luquire under his personal guaranty. Luquire received the full reduction engendered by the foreclosure action. *Amended Answer ¶ 2 admitting Amended Complaint ¶ 6.* The case proceeded to trial before the Honorable W. Jeffrey Young on November 28, 2012. Judge Young ruled the personal guaranty agreements were enforceable and entered judgment in favor of BB&T in the amount of $312,047.77, representing unpaid principal, interest and attorney's fees.

STANDARD OF REVIEW

An action to construe a guaranty contract is an action at law. *Crafton v. Brown*, 346 S.C. 347, 351, 550 S.E.2d 904, 905 (Ct. App. 2001). The trial of an action at law is reviewable under an 'any evidence' standard. *Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 540 S.E.2d 843 (2001). "In an action at law, tried, without a jury, the appellate court's standard of review extends only to the correction of errors of law." *Pope v. Gordon*, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006).

ARGUMENT

I. The Trial Court correctly held that Luquire's guaranty agreements remained enforceable on the undisputed debt.

The presiding Circuit Court Judge refused to reward Luquire for his false borrower affirmations by declaring his guaranty agreements unenforceable. Judge Young was correct in his application of law to these facts.

A. Luquire's cases have no bearing on these facts.

Luquire relies on *Carroll County Sav. Bank of Uniontown v. Strother*, 22 S.C. 552 (1885) to challenge the enforceability of his guaranty agreements. *Strother* presented a curious factual scenario. The holder of a promissory note sued the maker and the guarantors without presenting a copy of the note. In his Answer the maker challenged the adequacy of the consideration given for the note. The guarantors could not admit or deny whether they had executed the language on the note guarantying payment. Holder refused to provide the note to guarantors so that they might determine whether they had signed it. At trial, the maker was prepared to challenge the validity of the note but the holder surprisingly dismissed the maker. The holder then obtained judgment as a matter of law against the guarantors without presentation of the note. Against this backdrop, the Supreme Court reversed and remanded for a trial on the merits to determine whether there was a legitimate underlying obligation associated with the guaranty.

Unlike *Strother*, there was no factual challenge to the validity of the subject loan. Luquire admits that Indigo Limited, LLC borrowed funds and that he executed a personal guaranty in favor of BB&T on behalf of Indigo Limited, LLC. *Amended Answer ¶ 2.* Luquire admits that Indigo Ltd, LLC was a maker under the note modifications; that it is in default; and that he executed a personal guaranty on behalf of Indigo Ltd, LLC. *Amended Answer ¶¶ 8-10.* Luquire believed the loan would be repaid by Indigo Ltd., LLC or Turkey Creek Development, LLC, where he invested the loan proceeds. *Tr. p. 65, l. 16 – p. 66, l. 1.* Luquire concedes the loan is in default for Indigo Limited, LLC and for Indigo Ltd., LLC. *Amended Answer ¶ 2 (referring to Am. Compl ¶ 5) and Amended Answer ¶ 9.*

Luquire's other cases also afford no support on these facts. *Federal Deposit Ins. Corp. v. Stensland*, 70 S.D. 103 (1944) involved an underlying loan legislatively declared void in violation of public policy. *Scharnagel v. Furst*, 215 Ala. 528 (1927) reached a holding adverse to the individual guarantors, rather than in their favor. *Premier Bank v. Becker Development*, LLC, 767 N.W.2d 691 (2009) involved two borrowers, only one of which was included in the individual guaranty agreements. The parties' intentions were held to govern the scope of their obligations and the case was remanded for a trial on the merits.

B. Even if the foreclosure suit could have been challenged, Luquire guaranteed payment of Ltd.'s debt.

If Indigo Ltd, LLC is a separate entity from Indigo Limited, LLC, Indigo Ltd., LLC became an additional maker under the modification agreement.

> . . . The original obligation of the Borrower(s) as evidenced by the Promissory Note above is not extinguished . . . . This Agreement shall not release or affect the liability of any co-makers, obligors, endorsers or guarantors of said Promissory Note.
>
> *See Plt. Exh. 3, p. 2, next to last* ¶.

Both guaranty agreements executed by Luquire were absolute guaranties of payment. Each guaranty agreement contained the following language:

> This obligation and liability on the part of the undersigned shall be a primary, and not a secondary, obligation and liability, payable immediately upon demand without recourse first having been had by Bank against the Borrower . . . and without first resorting to any property held by Bank as collateral security . . .
>
> *See Plt. Exh. 2 and 4, p. 1,* ¶ *5.*

When a creditor holds an absolute guaranty of payment, the creditor may maintain an action directly against the guarantor immediately upon default of the debtor without

first attempting to collect from the maker of the note. *AMA Management Corp. v. Strasburger*, 309 S.C. 213, 420 S.E.2d 868 (Ct. App. 1992) Even if BB&T's foreclosure action was asserted against a non-entity due to Luquire's incorrect corrective deed, Luquire remained liable to BB&T under the guaranty executed on behalf of Indigo Ltd, LLC. BB&T had the right to collect in this direct action against Luquire without first obtaining a judgment against Indigo Ltd., LLC.

II. The Trial Court properly held that Luquire's liability under the guaranty agreements was distinct from the liability of the Borrower under the promissory note.

Luquire cites *Schuler v. Israel*, 120 U.S. 506 (1887) for the proposition that a judgment upon a note merges the note and its modifications with the judgment and the judgment thereby becomes the only evidence of the debt. In *Schuler*, the holder of the note commenced a case against the maker of the note in a District Court in Texas and proceeded to judgment. The holder commenced a subsequent case against the maker in Missouri on the same note. The maker argued that the holder, having proceeded to judgment against him on the note in Texas, was no longer able to maintain a redundant action *on the note* against the maker in District Court in Missouri. The Supreme Court held that the note as evidence of a maker's debt was merged into the Texas judgment rendered against the maker, thus foreclosing the holder from bringing a subsequent redundant action on the note against the same defendant in another jurisdiction.

The doctrine of merger as applies to judgments precludes successive suits against the same defendant on the underlying obligation after an earlier action has resulted in a judgment. Restatement (Second) of Judgments § 18, comment a. (1982). Having recovered a judgment against Israel in Texas, Schuler was precluded from suing him

again on the same note in Missouri. The doctrine of merger would have allowed Schuler to sue Israel a second time (on the judgment) to enforce the judgment, but did not allow Schuler to revert to suing Israel on the underlying note, again.

Unlike the *Schuler v. Israel* scenario, Luquire's liability arises from his guaranty agreements. Luquire was not a maker under the notes. The evidence of his liability is found in two personal guaranty agreements. Guarantors may not use borrowers' defenses to evade responsibility under their guaranty agreements. *Citizens and Southern Nat'l Bank v. Lanford*, 313 S.C. 540, 443 S.E.2d 549, 551 (1994); *Rock Hill Nat. Bank v. Honeycutt*, 289 S.C. 98, 344 S.E.2d 875 (Ct. App. 1986) (guarantors lacked standing to assert defenses of borrower). If the merger doctrine were applicable, it would protect Indigo Limited, LLC from another suit on the underlying note, not Luquire. The suit against Luquire is not a suit on the note.

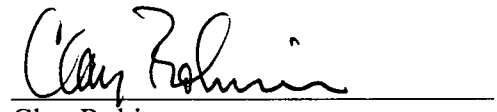
A guaranty of payment is an absolute or unconditional promise to pay a particular debt if it is not paid by the debtor at maturity. *AMA Management Corp. v. Strasburger*, 309 S.C. 213, 420 S.E.2d 868 (Ct. App. 1992). It is a personal obligation running directly from the guarantor to the creditor which is immediately enforceable against the guarantor upon default of the debtor. *Peoples Federal S & L v. Myrtle Beach Retirement Group*, 300 S.C. 277, 387 S.E.2d 672 (1989).

Assuming that Ltd. is a different entity than Limited, the foreclosure action did not name Indigo Ltd., LLC. Therefore, when this action was commenced, any collection claim against Indigo Ltd, LLC was still viable without having been reduced to judgment. BB&T's direct action against Luquire under the guaranty of payment was timely.

CONCLUSION

The Trial Court correctly ruled that Luquire's obligations as a guarantor were not rendered void by BB&T's foreclosure against the real property before seeking relief against him. The judgment against Luquire should be affirmed for the reasons stated here or on the basis of any ground appearing in the Record.

Respectfully submitted,



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Respondent's Counter Designation of Matter to be Included in the Record on Appeal

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In addition to Appellant's designations, Respondent proposes the following materials be included in the Record on Appeal:

1. Verified Complaint filed October 17, 2011;
2. Answer and Counterclaim filed March 1, 2012;
3. Transcript of Record of Trial held on November 28, 2012;
4. Plaintiff's Exhibits 7-14, 16-18 from Trial held on November 28, 2012;
5. Defendant Exhibit 4 from Trial held on November 28, 2012.

I certify that this designation contains no matter which is irrelevant to this appeal.

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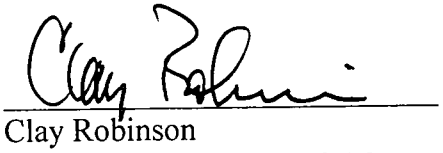
PROOF OF SERVICE

I certify that I have served Respondent's Initial Brief and Counter Designation of Matter to be Included in the Record on Appeal on P. Jason Luquire, by depositing a copy of it in the United States Mail, postage prepaid, on July 29, 2013, addressed to his attorneys of record, Tobias G. Ward, Jr. and J. Derrick Jackson, Tobias G. Ward, Jr., PA, Post Office Box 6138, Columbia, South Carolina 29260.



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