

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 First National Bank of the South,)
 Successor in interest to Carolina National)
 Bank and Trust Company,)
)
 Plaintiff,)
)
 vs.)
)
 James T. Callihan a/k/a James Callihan;)
 Edward L. Williams; Frank J. Pennisi a/k/a)
 Frank Pennisi; Dean J. Karavan a/k/a)
 D.J. Karavan; Charles T. Walls, Jr. a/k/a)
 Charles Walls; Robert S. Guyton; and)
 Jeffrey H. Skelley,)
)
 Defendants.)
)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT
 CASE NUMBER: 10-CP-26-3170

HORRY COUNTY
 13 JUN 28 PM 1:47
 MELANIE HUGHES-WARD
 CLERK OF COURT

ORDER AND JUDGMENT


Date of Hearing: May 20, 2013
 Trial Judge: Hon. W. Jeffrey Young
 Plaintiff's Attorney: Robert A. Kerr, Jr.
 Defendants' Counsel: Thomas C. Brittain, Daniel J. MacDonald, and C. Scott Masel
 Court Reporter: Henry P. Young

This matter came before the Court for a non-jury trial on May 20, 2013 in Conway, South Carolina. Based upon the pleadings and evidence before it, the Court makes the following Findings of Fact and Conclusions of Law.¹

FINDINGS OF FACT

1. For value received, an entity known as Sand Dollar Cottage, LLC (the "Borrower") made, executed and delivered to Carolina National Bank and Trust Company ("CNB") a written promissory note dated November 8, 2006, as amended, modified and/or renewed by written

¹ The Court notes that, to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and, to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.



instrument dated December 21, 2007 and April 30, 2008 (collectively hereinafter referred to as the "Note").

2. Under the terms of the Note, the Borrower promised to pay CNB the original principal sum of \$400,000.00, together with interest on the outstanding principal balance payable upon the terms and conditions set forth in the Note with a maturity date of May 3, 2011.

3. To better secure repayment of the Note, each of the Defendants, who are members of the Borrower, executed and delivered to CNB a separate Guaranty dated November 8, 2006 (each a "Guaranty" and collectively, the "Guaranty Agreements"). The Guaranty Agreements guaranteed payment of the Note and any extensions, renewals or replacements thereof and also inured to the benefit of CNB and its participants, successors and assigns.

4. The Defendants used the proceeds of the loan to purchase real property located in the Commonwealth of the Bahamas. Such property was not pledged as collateral for the loan due to the complexities of securing real property in the Commonwealth of the Bahamas.

5. As of February 18, 2008, CNB merged with First National Bank of the South ("FNBS"), as evidenced by a certification letter dated February 25, 2008 and that certain Certificate of Merger issued by the Comptroller of the Currency Administrator of National Banks. Accordingly, FNBS was the owner and holder of the Note and Guaranty Agreements when the Note was renewed on April 30, 2008.

6. As part of the loan renewal process in 2008, the Borrower made a principal reduction payment in the amount of \$100,000.00, thereby reducing the principal balance due and owing under the Note to \$300,000.00. Defendant Pennisi and Defendant Walls funded the principal payment reduction by making a loan and separate capital contributions to the Borrower.



7. Thereafter, the Borrower defaulted on its obligations under the Note by failing to make timely payments of principal and interest. The Defendants were advised of the Borrower's default and the Defendants have failed to remit the sums due under the Note, as required by the Guaranty Agreements. The entire balance of the Note is due and payable together with continuing interest thereon, attorneys' fees and costs of this action. Although Plaintiff made demand on the Defendants for such amount, the Defendants failed and refused to pay the same.

8. On April 13, 2010, FNBS filed this action, alleging a default under the Note and breach of the Guaranty Agreements.

9. During the pendency of this action, the Office of the Comptroller of the Currency closed FNBS and the Federal Deposit Insurance Corporation ("FDIC") was appointed as its Receiver. By Purchase and Assumption Agreement dated as of July 16, 2010 between the FDIC, as Receiver for FNBS, and NAFH National Bank, NAFH National Bank purchased and assumed certain assets of FNBS and became the owner and holder of the Note and Mortgage by assignment.

10. Thereafter, on June 30, 2011, NAFH National Bank merged with Capital Bank, N.A., with the resulting bank title of Capital Bank, N.A. Such merger was effective as of June 30, 2011, as evidenced by a certification letter dated June 30, 2011 from the Comptroller of the Currency Administrator of National Banks.

11. On August 3, 2011, Defendant Williams filed a Voluntary Petition under Chapter 7 of the United State Bankruptcy Code (11 U.S.C. § 101 et seq.) in the United States Bankruptcy Court, District of South Carolina, identified as Case Number 11-04864-dd. Plaintiff filed a proof of claim in the bankruptcy case. An Order of Discharge was entered on March 6, 2012.

A handwritten signature in black ink, appearing to be the initials 'WJ' followed by a stylized flourish.

12. As of May 20, 2013, the principal amount due under the Note is \$243,830.99. Accrued but unpaid interest through May 20, 2013 is \$63,935.77. Additionally, there are late charges of \$400.00. Interest accrues on the outstanding balance at the rate of \$45.72 per day.

13. Plaintiff received payment on its proof of claim in the Williams Bankruptcy in the amount of \$10,462.35. This amount was received and applied to the unpaid principal balance on June 11, 2012.

14. The total debt exclusive of attorney fees as of May 20, 2013 is \$308,166.76. Additionally, the Note and the Guaranty Agreements provide for recovery by Plaintiff of a reasonable sum as attorneys' fees from Defendants.

15. This matter was filed on April 13, 2010 – three months before FNBS was closed. Pursuant to Rule 25 (c), SCRCF, this case has continued to be prosecuted in the name of FNBS.

CONCLUSIONS OF LAW

1. The Note and Guaranty Agreements are enforceable according their terms, and they are owned and held by Capital Bank, N.A. The definition section found on page two of the Note, placed in evidence at trial, states: “You” or “your” means the Lender and its successors and assigns.” (emphasis added). The evidence adduced at trial through testimony and documentary evidence shows that Carolina National Bank and Trust, the original lender, merged into FNBS effective February 18, 2008. The merger was approved by bank regulators. Under state law and federal law, the effect of a merger is the same. The property of the merged firm is vested in the surviving firm without requiring some form of transfer. ²

² See S.C.Code § 33-11-106 (“When a merger takes effect ... the title to all real estate and other property owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment....”); and 12 U.S.C. § 215 (e) “The corporate existence of each of the consolidating banks or banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and such consolidated national banking association shall be deemed to be the same corporation as each bank or banking association participating in the consolidation. All rights, franchises, and interests of the individual consolidating banks or banking associations in and to every type of property (real, personal, and mixed) and choses

2. The documentary evidence and testimony at trial showed that the Note, as renewed, and all Guaranty Agreements were later assigned by FDIC as Receiver of FNBS to NAFH National Bank effective July 16, 2010 when FNBS was closed by the regulators. The documentary evidence and testimony at trial also showed that NAFH National Bank and Capital Bank, N.A. merged effective June 30, 2011, with the resulting bank title, Capital Bank, N.A.

3. The record demonstrates that Capital Bank, N.A. is the owner of the Note, as renewed, and the Guaranty Agreements, and is entitled to enforce those obligations.

4. The record further shows that no guarantor was released from the obligations of their Guaranty Agreement. Each Guaranty was admitted into evidence. Each contained clear provisions concerning modification or release. A guaranty is a promise to pay a debt if the person liable in the first instance fails to make payment. *McGee v. F.W. Poe Mfg. Co.*, 176 S.C. 288, 180 S.E. 48 (1935). Here, the Note, as renewed, is in default and the Defendants each promised to pay the Borrower's debt if Borrower did not. Further, a guaranty 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 Savings and Loan Assoc. v. Myrtle Beach Retirement Group, Inc.*, 300 S.C. 277, 387 S.E.2d 672 (S.C. 1989). It is irrelevant whether the Plaintiff pursued the Borrower.

5. The Guaranty Agreements state that a writing signed by the bank is required for a guarantor to be released from the obligations of his Guaranty. In determining the nature of a guaranty the first consideration is the written language. *Pee Dee State Bank v. National Fiber Corp.*, 287 S.C. 640, 340 S.E.2d 569 (Ct.App.1986).

in action shall be transferred to and vested in the consolidated national banking association by virtue of such consolidation without any deed or other transfer."



6. Here, Defendants argue they only guaranteed the first loan from Carolina National Bank & Trust to Borrower. However, the clear language of each Guaranty Agreement defeats their argument. The Guaranty Agreement is given to the "Lender", which is defined to include participants, successors and assigns. Further, by clear terms, each Guaranty is a guaranty of Note Number 400378400 dated 11/8/2006 and "any extensions, renewals or replacements."

7. The Court further concludes that the case has been prosecuted by a proper party. This matter was filed on April 13, 2010 – three months before FNBS was closed. Pursuant to Rule 25(c), SCRPC, this case has been prosecuted in the name of FNBS. Rule 25(c) provides: "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party."

8. Rule 25(c) applies to the transfer of interest from one corporation to another with which the first merged. See *Bryant v. Waste Management, Inc.*, 536 S.E.2d 380, 342 S.C. 159 (S.C.App. 2000). Further, "[u]nless the debt instrument or the instrument of guaranty prohibits assignment, an assignment does not release the guarantor, who is discharged only when the underlying debt has been paid or otherwise satisfied in full." *AMA Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 219, 420 S.E.2d 868, 872 (Ct.App.1992).

9. Defendant Walls raised certain arguments for the first time in his post-trial memorandum. No party asserted reformation as a claim or a defense in their pleadings, and the issue was not tried by implication.

10. Having considered the nature, extent and difficulty of the services rendered, the time involved in reviewing the various documents, performing the title search, preparing the pleadings, attendance at hearings, mediation, and trial of the case, the professional standing of



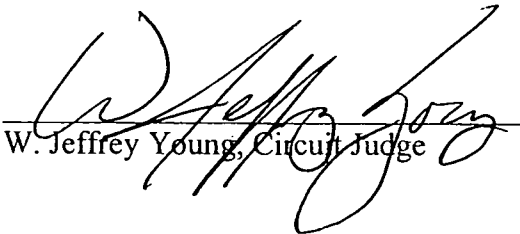
counsel, the fee customarily charged for similar services and the beneficial results obtained for the Plaintiff, I find that the sum of \$50,000.00 is a reasonable fee to allow as attorneys' fees for Plaintiff's attorneys for services performed.

11. Having held that the Guaranty Agreements are enforceable according their terms, that the underlying Note is in default, and the Note and Guaranty Agreements are owned and held by Capital Bank, N.A., it is hereby

ORDERED, ADJUDGED AND DECREED THAT

- a. The total debt due to the Plaintiff by Defendants, as of May 20, 2013 and exclusive of attorney fees, is \$308,166.76.
- b. Plaintiff is entitled to an award of attorney fees in the amount of \$50,000.00;
- c. Judgment shall be entered, jointly and severally, against Defendants James T. Callihan a/k/a James Callihan; Frank J. Pennisi a/k/a Frank Pennisi; Dean J. Karavan a/k/a D.J. Karavan; Charles T. Walls, Jr. a/k/a Charles Walls; Robert S. Guyton; and Jeffrey H. Skelley, in the amount of \$358,166.76 together with interest thereon after May 20, 2013 at the statutory post-judgment rate, in favor of Capital Bank, N.A.

IT IS SO ORDERED!


W. Jeffrey Young, Circuit Judge

Dated: June 21, 2013
Sumter, South Carolina