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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Hon. Edward W. Miller, Judge

Appellate Court Case No.: 2022-001619

ScanSource, Inc., Respondent
v.
Dependable Technology Center, LLC
and George G. Moraru, Appellants,

PETITION FOR REHEARING

J. Falkner Wilkes, 12893
248 Deerwood Park Drive
Oakland, MS 38930
(864) 421-4618
jfalknerwilkes@gmail.com

William R. McKibbon, III
601 East McBee Avenue, Suite 104
Greenville, SC 29601
(864) 235-0071
will@legalcarolina.com

Counsel for Appellant

PETITION

Pursuant to Rule 221, SCACR, Appellants move this Court for rehearing based on the following points the Appellants submit have been overlooked or misapprehended by the Court.

A. THE COURT'S OPINION FAILS TO ADDRESS APPELLANTS' LACK OF CONSIDERATION ISSUE.

The Court's opinion as to the enforceablity of the personal guarantee fails to address the Appellant's argument as to lack of consideration. Appellant's issue as stated is whether the court erred in ruling Moraru's individual personal guarantee valid and enforceable as a matter of law. The crux of Appellant's argument was that the Guarantee became invalid and unenforceable in 2013 due to a lack of consideration. The Court's opinion does not address the issue nor the underlying evidence that creates a question of fact.

Moraru's offer of a personal guarantee required consideration for the 2013 Guarantee to become a valid and enforceable contract. Valuable consideration may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." McPeters v. Yeargin Constr. Co., 290 S.C. 327, 331, 350 S.E.2d 208, 211 (Ct. App. 1986). Here the Guarantee expressly states that consideration for Moraru's offer of guarantee includes the extension of trade credit to the debtor. R. 82. When the Respondent rejected the Customer Application and denied trade credit in 2013, consideration for the Guarantee failed and no contracts were formed. Thus the Guarantee became invalid and unenforceable in 2013. The Court's opinion fails to address how the rejected, invalid, and unenforceable guarantee could be unilaterally resurrected by the Respondent a year later and

applied to a new attempt by the corporation to obtain credit. The record contains no evidence to show that in 2014 Moraru intended that the otherwise dead and unenforceable Guarantee be applied to subsequent attempts by the corporation to obtain credit.

When combined with the lack of evidence as to any intent on the part of Moraru in 2014 to have the Guarantee resurrected, the evidence in record is sufficient to create a question of fact as to the validity of the Guarantee once the Respondent rejected the Customer Application and declined trade credit in 2013. Respondent's chief financial officer Steven Zielinski testified that the Personal Guarantee was part of the Customer Application, and that the Customer Application was rejected in 2013. R. 63-66. The facsimile information on the Guarantee and Customer Application show that they were submitted simultaneously as one document. R. 79-82. "If a note and guaranty are executed simultaneously, the consideration of the note functions as consideration for the guaranty; however, if the documents are not executed simultaneously, there is no presumption of consideration, and the consideration must be proved. See id. at 351, 550 S.E.2d at 907." Branch Banking v. Carolina Crank & Core, Inc., 362 S.C. 647, 608 S.E.2d 896 (S.C. App. 2005). The Guarantee specifically states that the extension of trade credit, which was provided for in the Customer Application, was consideration for the Guarantee. R. 63-66. The Guarantee was therefore clearly part and parcel of the 2013 Customer Application. As a result, when the application for trade credit was declined in 2013 consideration for the Guarantee failed and no contract resulted.

The Court’s opinion fails to address how a contract that failed in 2013 for lack of consideration can unilaterally be revived by the Respondent in 2014, especially where there is no evidence in record indicating any intent on the part of Moraru individually to have the Guarantee

revived and applied to the corporation's subsequent attempts to obtain trade credit. While the Court's Opinion talks about an ongoing business relationship and credit extensions, the record shows that subsequent attempts by the corporation to obtain credit were completely independent of the 2013 Guarantee and Customer Agreement of which it was a part. There were no credit sales in 2013. R. 66-67. After the 2013 rejection subsequent attempts to obtain credit were initiated by the corporation's submission of a entirely new Customer Agreements. R. 5; 10. There is also no evidence that the Guarantee at issue was resubmitted with the 2014 Customer Application under which trade credit was granted, or that it was Moraru's intention that it be resurrected and made part of the 2014 Customer Agreement. "In ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and to deny the motion when either the evidence yields more than one inference or its inference is in doubt." Est. of Carr ex rel. Bolton v. Circle S Enters., Inc., 379 S.C. 31, 38, 664 S.E.2d 83, 86 (Ct. App. 2008). The record is therefore sufficient to create a jury question as to whether the Guarantee died for lack of consideration and became unenforceable in 2013. As a result, the circuit court's ruling on the validity of the Guarantee as a matter of law and directed verdict were in error.

The Court's Opinion further errs in its reliance on the confession of judgment by the corporate defendant in its analysis of Moraru's liability under the Guarantee. In its analysis the Court appears to find that both Appellants confessed judgment at trial. The record shows that only the corporate defendant confessed judgment. R. 74-75. The question of the debt's validity as to the corporate defendant and the question of extent to which the Guarantee can be enforced against Moraru are separate issues. To the extent that the Court's Opinion is based on a finding

that both Appellants confessed judgment, it is in error.

B. THE COURT ERRED IN FAILING TO CONSIDER AND CONSTRUE THE GUARANTEE IN LIGHT OF THE $5,000 CREDIT LIMIT IN THE CUSTOMER APPLICATION TO WHICH IT WAS APPLIED.

To the extent that the Guarantee is held valid as to the 2014 Customer Application, Moraru's obligation under the Guarantee should be construed in light of the $5,000 credit limit requested in that Application. The Court's opinion interprets the terms and conditions of the Guarantee in isolation from those of the 2014 Customer Application to which it is being applied. In doing so the Court overlooks evidence proving that a guarantee is an integral part of a customer application. Facsimile transmittal information on the Guarantee and Customer Application submitted in 2013 show that both documents were executed and submitted simultaneously, by the same parties, for the same purpose, and in the course of the same transaction. R. 81-83. "The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the instruments together." Klutts, 268 S.C. at 88, 232 S.E.2d at 24. The record therefore shows that the Guarantee and 2013 Customer Application were so closely connected that they must be construed in light of each other. The Court's application of the Guarantee to the 2014 Customer Agreement does nothing to change that fact that the Guarantee must be construed in light of whatever Agreement to which it is applied.

The Court finding that Klutts is inapplicable is based entirely on the fact that the 2013 Guarantee was not contemporaneously executed with the 2014 Customer Agreement. This

misses the mark on Klutts entirely, and overlooks that fact that a guarantee is a part of a customer application. If the Court finds the Guarantee became a be part of the 2014 Customer Application it would have to find that it did so 2014 when that application was submitted, since it certainly could not become a part of the application before the application existed. If it became a part of the application in 2014, given Klutts, it must be construed in light of the terms of that application, including the $5,000 credit limit.

C. THE COURT'S OPINION ON APPELLANTS' LACK OF OPPORTUNITY TO PRESENT EVIDENCE MISPERCEIVES THE FINALITY OF THE CIRCUIT COURT'S RULING AND APPLICABLE LAW.

During the testimony of the plaintiff's first witness, and before the Appellants had an opportunity to present any witnesses, the circuit court *sua sponte* made a ruling finding the Guarantee at issue valid as a matter of law. R. 71. This was clearly error on the part of the circuit court. "The law, however, does not permit a court to issue judgment against a party before giving that party an opportunity to present evidence in support of her position." Halsey v. Simmons, 432 S.C. 54, 849 S.E.2d 578 (S.C. 2020). This Court, however, found Halsey inapplicable based on the Appellant's failure to attempt to continue to offer or proffer proof or otherwise argue. This was error.

In this case the circuit court made a clear and definitive ruling on the validity of the guarantee: "So I'm going to rule as a matter of law that that guarantee is valid. Okay? All right." R. 71, l. 21-23. After pointing out that the Court had ruled *sua sponte* Appellants' counsel inquired as to the record "for the purposes of appealing that issue," to which the court interrupted and said: "Everything is on the record, –". R. 53, l.1-6. Subsequent to the court's ruling the corporate defendant confessed judgment. R. 74. When asked by the court if Moraru was also

confessing judgment counsel stated that he was not, but pointed out that there was nothing left to litigate: “And since you had ruled the guarantee is valid and enforceable, I don't know how there's an issue left. R. 76, l. 20-21. Further discussions led to counsel again asking the court again if it had ruled that the Guarantee is valid and enforceable, to which the court responded clearly that it had. R. 75, l. 16-18. The court’s initial ruling was therefore intended and considered as final. As a result the court ruled without allowing the Appellants the opportunity to present evidence or be heard fully on the issue.

Once the court ruled that the Guarantee was valid and enforceable Moraru’s issue was adjudicated and liability established. Since Moraru did not contest the amount of credit sales incurred by the corporation there was nothing left for Moraru to litigate once the corporate defendant confessed judgment. R. 74. This Court’s opinion refuses to apply Halsey because “Appellants did not attempt to proffer any additional evidence, though they now argue on appeal they were prejudiced by the lack of such opportunity.” The Court overlooks the fact that counsel was prevented from attempting to argue the point further once the circuit court had ruled: "Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced. Rule 43(i), SCRCP." Since it would have been inappropriate for the Appellants to continue to argue the point, it was error for this Court to fault them in its analysis for not doing so.

The Court’s opinion also distinguishes Halsey based on the Appellants’ failure to set forth the facts and theories in a Rule 59(e) motion. This is error. Nothing in the holding of Halsey requires a Rule 59(e) motion be filed to preserve issues when a party is denied an opportunity to present witnesses and evidence prior to a court’s ruling. Halsey merely mentioned the Rule 59(e)

motion in its procedural history of the case, it was not necessary to or a part of the holding.

D. THE COURT MISPERCIEVES FACTS AND LAW RELEVANT TO ITS ANALYSIS OF THE JUDGMENT EXCEEDING $5,000.

A guarantee is a contract. TranSouth Fin. Corp. v. Cochran, 324 S.C. 290, 294, 478 S.E.2d 63, 65 (Ct. App. 1996). A note and guarantee are two separate contracts. First Sav. Bank, FSB v. Capital Investors, 318 S.C. 555, 557, 459 S.E.2d 307, 308 (1995). However, "[t]he general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the instruments together." Klutts, 268 S.C. at 88, 232 S.E.2d at 24. "Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated." *Id*. at 88-89, 232 S.E.2d at 24. Conversely, when the terms of a written guarantee agreement are clear and complete, extrinsic evidence of agreements or understandings contemporaneous with or prior to its execution cannot be used to contradict, explain, or vary its terms. Pee Dee State Bank v. Nat'l Fiber Corp., 287 S.C. 640, 643, 340 S.E.2d 569, 570-71 (Ct. App. 1986).

In the present matter, the Guarantee provides that Moraru is individually responsible for "any obligation to Creditor on demand of any indebtedness of Debtor to Creditor now due and/or which may hereafter become due to Creditor." The Guarantee is dated April 12, 2013 and states that it is made "[i]n conjunction with my individual personal guarantee and customer application to ScanSource, Inc." The Customer Application referenced is also dated April 12, 2013 and was

submitted contemporaneously with the Guarantee as evidenced by the transmittal information on the both documents. R. 79-81. Respondent's chief financial officer Steven Zielinski testified that the Guarantee was part of the Customer Application. R. 66, l. 13-25. Because the 2013 Customer Application and the Guarantee were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the two documents should be read together. *See* First Sav. Bank, 318 S.C. at 557, 459 S.E.2d at 308; Klutts, 268 S.C. at 88, 232 S.E.2d at 24. This is especially true where the Guarantee indicates that the extension of trade credit under the Customer Agreement is consideration for the Guarantee. To the extent that the Court applies the Guarantee to the 2014 Customer Agreement, those documents should likewise be read together.

The record shows that the 2013 Customer Application and Guarantee were declined. The Respondent subsequently approved Dependable's Customer Application dated September 10, 2014. That application indicated a request for a credit limit of $5,000. No Guarantee was submitted with the 2014 Customer Application. Assuming *arguendo* that the 2013 can be applied to the Customer Agreement dated September 10, 2014, they must be read together just as they would have been had the Guarantee been applied to the 2013 Customer Agreement. While the original Customer Application requested as much as possible, the subsequent submission of a Customer Application requested trade credit limit of only $5,000. It was the later that the Respondent accepted, and attaches liability for, through the Guarantee from 2013. If the Guarantee is applied to the 2014 Customer Application there is no valid basis to distinguish it from the holdings of First Sav. Bank or Klutts. Any rationale that the Court assigns for applying the Guarantee to the 2014 Customer Application negates placing any significance on the dates the documents were transmitted. As the Court rejected the argument that the Guarantee was

invalid, giving it the same effect as had it been submitted with the 2014 Customer Application, then so it should be treated in the Court's analysis under First Sav. Bank and Klutts.

In Pee Dee State Bank, this Court scrutinized a guarantee executed as security for an $85,000 loan to a corporation. 287 S.C. at 641, 340 S.E.2d at 570. The loan was secured by the personal guarantees of two of its officers. *Id.* After the corporation repaid the first loan, the bank loaned another $85,000, which was never repaid. *Id.* One officer contested his liability for the second loan, claiming his personal guarantee was only for the first loan. Id. at 642, 340 S.E.2d at 570. The court found the guarantee, entitled "UNCONDITIONAL CONTINUING PERSONAL GUARANTY" in all caps, was plain on its face and not limited to the initial loan. Id. at 642, 340 S.E.2d at 570.

Notwithstanding, Pee Dee State Bank is reconcilable with the rule of construing related documents together enunciated in Klutts, which has been cited frequently in this state. *See, e.g.,* Cafe Assocs. v. Gerngross, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991); Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp., 287 S.C. 346, 350, 338 S.E.2d 631, 633 (1985); Wilbur Smith & Assocs. v. Nat'l Bank of S.C., 274 S.C. 296, 299, 263 S.E.2d 643, 645 (1980); Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 498-99, 649 S.E.2d 494, 502 (Ct. App. 2007). The guarantee in Pee Dee State Bank was, by its terms, a continuing guarantee for full payment of all debts "whether now owing or due, or which may hereafter, from time to time, be owing or due, and howsoever heretofore or hereafter created...." Pee Dee State Bank, 287 S.C. at 642, 340 S.E.2d at 570. The court refused to consider extrinsic evidence of agreements or understandings contemporaneous with, or prior to, its execution to explain the terms in the guarantee because the guarantee was clear and complete on its own. *Id. at* 643, 340 S.E.2d at

570-71. However, in the present case, the guarantee signed by Moraru and original Customer Application in 2013 were submitted contemporaneously as one document. Respondent's chief financial officer testified that the Guarantee was part of the Customer Application. R. 63-66. The Guarantee should therefore be construed together with the Customer Application on which the Respondent's claims are based. When read in conjunction with the approved 2014 Customer Application the Guarantee can be interpreted as being limited to $5000, the amount of credit requested by the corporation. At a minimum, for direct verdict purposes, this fact distinguishes the present case from the unconditional guarantee found in Pee Dee State Bank in which no such additional fact raised a question as to the intent of the parties.

Further, although not discussed, the indication that the guarantee in Pee Dee State Bank was unconditional and continuing could be interpreted as a contrary intention that the guarantee should not be considered together with the other contemporaneously executed documents. *Cf.* Klutts, 268 S.C. at 88, 232 S.E.2d at 24 (construing instruments executed at the same time together "in the absence of anything indicating a contrary intention"). In the present case, the personal guarantee submitted by Moraru contemporaneously with the 2013 Customer Application does not contain any indication it should not be read together with the Customer Application; especially where the guarantee references the Customer Application and the extension of trade credit as consideration for the Guarantee and evidence shows that the Respondent considers a guarantee part of a customer application.

Ultimately, if the guarantee and the customer application at issue are construed together, there is more than one inference that may be drawn therefrom. Respondent views the terms of the guarantee as insuring payment of "all future and current indebtedness." Moraru, on the other

hand, contends that if the Guarantee is valid as to the 2014 Customer Agreement it is limited to $5,000. As long as there is at least sufficient evidence to create a question of fact as to Moraru's position, the grant of directed verdict and the award of damages should be reversed. *See* USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008); Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Based on the foregoing this Court should grant a rehearing in the matter.

Respectfully submitted,

s/J. Falkner Wilkes

J. Falkner Wilkes, 12893
248 Deerwood Park Drive
Oakland, MS 38930
(864) 421-4618
jfalknerwilkes@gmail.com

William R. McKibbon, III
601 East McBee Avenue, Suite 104
Greenville, SC 29601
(864) 235-0071
will@legalcarolina.com

Counsel for Appellant

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CERTIFICATE OF SERVICE

I certify that on August 16, 2024, I served the Appellants' Petition for Rehearing on the Respondent by delivering a copy AIS email to counsel of record and others if, and as, indicated below:

Craig H. Allen
POB 10854
Greenville, SC 29603
(864) 239-0444
Attorney for Respondent

via AIS email only to: craig@craigallenlaw.com

Attorney for Respondent

and to:

William R. McKibbon, III
601 East McBee Avenue, Suite 104
Greenville, SC 29601
(864) 235-0071
Attorney for Appellants
via AIS email only to: will@legalcarolina.com

Jenny Abbott Kitchings
Clerk of the Court of Appeals
P.O. Box 11629
Columbia, SC 29211
via email filing only to: ctappfilings@sccourts.org

Respectfully submitted,

s/J. Falkner Wilkes
J. Falkner Wilkes (SC Bar #12893)
248 Deerwood Park Drive
Oakland, MS 38948
(864) 421-4618
jfalknerwilkes@gmail.com

Counsel for Appellants

August 16, 2024.