

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

RECEIVED

SEP 27 2013

SC Court of Appeals

Branch Banking and Trust
Company,

Respondent,

v.

P. Jason Luquire

Appellant.

FINAL BRIEF OF APPELLANT

Tobias G. Ward, Jr.
J. Derrick Jackson
Tobias G. Ward, Jr. PA
Post Office Box 6138
Columbia, South Carolina 29260
(803) 708-4200
tw@tobywardlaw.com
Attorney for Appellant

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STATEMENT OF ISSUES ON APPEAL

1. **DID THE TRIAL COURT ERR IN FINDING LUQUIRE LIABLE TO BB&T UNDER THE GUARANTY WHEN THE PRINCIPAL DEBT IN THE NAME OF "INDIGO LIMITED, LLC" IS A VOID OBLIGATION IN THE NAME OF A NONEXISTENT COMPANY?**
2. **DID THE TRIAL COURT ERR IN CONCLUDING THAT THE LOAN MODIFICATIONS WITH "INDIGO LTD, LLC" CURED ANY ERROR WHEN BB&T OBTAINED A FORECLOSURE DEFICIENCY JUDGMENT SOLEY IN THE NAME OF "INDIGO LIMITED, LLC" DESPITE BEING WARNED IT WAS THE WRONG ENTITY AND A NONEXISTENT COMPANY?**

STATEMENT OF THE CASE

BB&T commenced this action on October 17, 2011 as a suit under two guaranty agreements to recover the amount claimed due under a deficiency judgment. (R. 13) The Defendant P. Jason Luquire (Luquire) accepted service on January 9, 2012 and filed an answer and counterclaim on February 14, 2012. (R.16) BB&T filed its reply on March 12, 2012. On May 29, 2012, Luquire filed a motion to amend his answer and counterclaim. On or about June 12, 2012, Luquire served the amended answer and counterclaim. On June 26, 2012, BB&T served its reply to the amended answer and counterclaim. On September 18, 2012, BB&T filed an amended complaint. (R. 17) On October 8, 2012, Luquire filed an answer and counterclaim to the amended complaint. (R. 44) BB&T replied to the answer and counterclaim on October 29, 2012. (R. 48) A trial was held before the Honorable W. Jeffrey Young on November 28, 2012. (R. 53) By order dated January 10, 2013, the court granted judgment to BB&T in the amount of \$264,017.33 plus costs and attorney's fees in the amount of \$48,030.37 for a total judgment of \$312,047.77. (R. 1) Luquire timely served his Notice of Intent to Appeal on February 6, 2013. This appeal followed.

FACTUAL BACKGROUND

Approximately October 2, 2007, Luquire signed a Promissory Note (Note), drafted and provided by BB&T, which listed "Indigo Limited, LLC" as obligor for principal sum of Two Hundred Fifty Thousand and 00/100 Dollars (\$250,000.00). (R. 145) Luquire also signed a personal guaranty for this Note. (R. 149) The loan was further secured by a mortgage on Lot 207, Cravens Grant in Georgetown County. This Note was subsequently modified on September 22, 2008, changing the name of the obligor from "Indigo Limited, LLC" to "Indigo Ltd., LLC" and extending the maturity date for another year. (R. 153) Luquire signed another personal guaranty for the modified Note. (R. 157)

BB&T and Indigo Ltd., LLC again modified the promissory note on October 13, 2009, to extend maturity until January 13, 2010. (R. 161) Upon the maturity date, BB&T refused to renew the Note again and Indigo Ltd., LLC failed to pay the principal balance due. (R. 190) BB&T began collection activities against "Indigo Ltd., LLC" on the modified Note.

BB&T filed a foreclosure action against "Indigo Limited, LLC" to foreclose its mortgage securing the debt (2010-CP-22-0952). (R. 195) Luquire had notice of this foreclosure but was not named a party. *Prior* to the foreclosure hearing, Luquire's attorney sent BB&T's attorney a memo warning him that "Indigo Limited, LLC" is not an existing South Carolina LLC and that a name change occurred July 14, 2003 to Indigo Mortgage, LLC. (R. 200) Luquire's counsel also notified BB&T that neither Indigo Limited, LLC nor Indigo Mortgage, LLC, should be the record owner of Lot 207. (R. 200) Despite these warnings, BB&T proceeded to obtain a deficiency judgment on the modified Note against "Indigo Limited, LLC" in the amount of \$231,665.27. (R. 165) BB&T commenced the present action for judgment on the personal guaranty of Luquire

for both the original Note in the name of Indigo Limited, LLC and the modified Note in the name of Indigo Ltd., LLC.

ARGUMENT

I. LUQUIRE IS NOT LIABLE ON THE GUARANTY FOR INDIGO LIMITED, LLC BECAUSE THERE IS NOT A PERSON LIABLE AS PRINCIPAL SUCH THAT THE GUARANTY IS A COLLATERAL UNDERTAKING.

According to the records of the South Carolina Secretary of State there is no entity called "Indigo Limited, LLC." There was an entity called Indigo Limited, LLC, but it changed its name by amendment on July 14, 2003 to Indigo Mortgage. (R. 183) This was over four years prior to the BB&T note and is a matter of public record. Since the Note was never in the name of an existing entity it is invalid and unenforceable. The court should bear in mind that BB&T prepared all the loan documents including the Note and modified Note.

Generally a guaranty is a collateral undertaking, and it is essential to its existence that there should be someone liable as principal; and if there be no valid claim against the principal, there is no existing contract of guaranty. *Carroll County Sav. Bank of Uniontown v. Strother*, 22 S.C. 552 (1885).

"...a guaranty is dependent on the existence of a principal obligation, if the principal contract is invalid for reasons inherent in itself, the guaranty generally is also invalid. This rule pertains, in particular, where the principal contract and the guaranty thereof are parts of one entire transaction so that there is as a matter of fact only one contract. 38A C.J.S. Guaranty § 15, "Effect of invalidity of principal contract."

It is generally held that if a contract is invalid, the guaranty partakes of the character of the principal contract and is also invalid. *Federal Deposit Ins. Corp. v. Stensland*, 70 S.D. 103, 110 15 N.W.2d 8 (1944)(citing 38 C.J.S., Guaranty, §16; 24 *Am.Jur.Guaranty* 41.) The rule undoubtedly is that anything that renders the obligation absolutely void and unenforceable against the principal is available to the guarantors

also, in avoidance of their liability on the guaranty, even though their principal is not made a party defendant, and has not asserted the invalidity of his obligation. *Scharnagel v. Furst*, 215 Ala. 528, 112 So. 102, 104 (1927). If a primary or principal obligation does not exist, there cannot be a contract of guaranty ... [because] there must be a principal debtor or obligor[,] [and][w]ithout a principal debt there can be no guaranty. *Premier Bank v. Becker Development, LLC*, 767 N.W.2d 691, 696 (Minn. Ct. App. 2009)(citing *Clark v. Otto B. Ashbach & Sons, Inc.*, 241 Minn. 267, 275, 64 N.W.2d 517, 522 (1954)(*reversed by Premier Bank v. Becker Dev., LLC*, 785 N.W.2d 753, 758 (Minn.2010) on unrelated grounds.)

Therefore, the guaranty signed by Luquire for "Indigo Limited, LLC" should be held nonexistent and invalid since there is no one liable as principal such that the guaranty is a collateral undertaking.

II. LUQUIRE IS NOT LIABLE ON THE GUARANTY FOR "INDIGO LTD, LLC" BECAUSE DESPITE BEING WARNED THAT "INDIGO LIMITED, LLC" WAS NOT A VALID ENTITY, BB&T PROCEEDED TO JUDGMENT ON BOTH THE ORIGINAL NOTE AND THE "LTD" NOTE MODIFICATIONS THEREBY MERGING THE NOTES INTO A SINGLE JUDGMENT DEBT AGAINST A NONEXISTENT ENTITY.

Likewise, the guaranty for Indigo Ltd., LLC (a completely separate entity (R. 184) must also fail. Prior to proceeding to judgment in the name of Indigo Limited, LLC, BB&T was specifically advised by Defendant's counsel that Indigo Limited, LLC was not a valid entity. (R. 200) Despite this warning, BB&T proceeded to judgment against "Limited" only, thereby merging the "Limited" Note and the "Ltd" Note modifications in 2008 and 2009 into a single judgment debt against "Indigo Limited, LLC." *Schuler v. Israel*, 120 U.S. 506 (1887)(A judgment upon a note merges it and it becomes the only evidence of the debt.) Since the only existing debt is against a nonexistent principal and the "Ltd" debt merged into the judgment, any guaranty signed by Luquire for Indigo Ltd., LLC should be held nonexistent and invalid since there is no one liable as principal

such that the guaranty is a collateral undertaking. For this reason, the court erred in granting judgment against Luquire.

CONCLUSION

BB&T is the author of its own injury in this case. BB&T prepared the loan documents in the name of a nonexistent entity. BB&T could have checked with the South Carolina Secretary of State and obtained the correct information. Despite being warned, BB&T proceeded to judgment against a nonexistent entity thereby merging its debt (including all loan modifications) into a deficiency judgment against a nonexistent entity as principal. Since there is no principal, the guarantees are not enforceable as a matter of law. This court should reverse the trial court and remand for entry of judgment in favor of the Appellant Jason P. Luquire.

Respectfully submitted,

TOBIAS G. WARD, JR., PA



Tobias G. Ward, Jr.
6 Calendar Court, Suite 3
Columbia, SC 29206
SC Bar No.: 5826
803-708-4200
Fax 803-403-8754
Attorney for Appellant

Dated: Sept. 26, 2013

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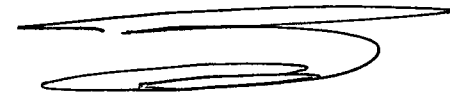
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CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Final Brief and the Appellant's Final Reply Brief comply with Rule 211(b). SCACR

September 26, 2013



Tobias G. Ward, Jr.
J. Derrick Jackson
Tobias G. Ward, Jr. PA
Post Office Box 6138
Columbia, South Carolina 29260
(803) 708-4200
tw@tobywardlaw.com
Attorney for Appellant

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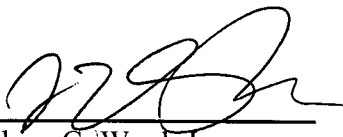
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Appellant.

PROOF OF SERVICE

I certify that I have served a copy of the Final Brief of Appellant, Appellant's Reply Brief and Certificate of Counsel on Branch Banking and Trust Company by depositing a copy of each in the United States Mail, postage prepaid, on September 27, 2013, addressed to his attorney of record, Clay Robinson, Post Office Box 944, Columbia, South Carolina 29202 .

September 27, 2013


Tobias G. Ward, Jr.
J. Derrick Jackson
Tobias G. Ward, Jr. PA
Post Office Box 6138
Columbia, South Carolina 29260
(803) 708-4200
tw@tobywardlaw.com
Attorney for Appellant