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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas  
Alexander S. Macaulay, Circuit Court Judge

Case No. 2011-CP-04-2728  
Appellate Case No. 2013-002341

LNV Corporation ..... Respondent

v.

Affordable Hospitality Group–Anderson, LLC;  
Diversified Capital Investment Group, LLC; Jay Berlye;  
Anderson County, South Carolina, and the State of South  
Carolina ..... Defendants,

Of Whom Affordable Hospitality Group–Anderson, LLC;  
Diversified Capital Investment Group, LLC; and Jay  
Berlye are ..... Appellants.

BRIEF OF APPELLANTS

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## **Statement of Issues on Appeal**

Issue One – The trial court went beyond the allegations of the counterclaim to dismiss it, thus violating standards governing dismissal motions under Rule 12(b)(6) SCRCP.

Issue Two – The trial court misread Appellants’ pleading to find that their counterclaims arose before November 2009, thereupon erroneously dismissing such counterclaims with prejudice instead of granting leave to amend.

Issue Three – The trial court improperly interpreted modifications of the construction agreement as releases of performance under the Basic Contract and any claims of breached performance that might arise in the future .

Issue Four – As matter of law, trial court erred in holding that Basic Contract was unenforceable as a “non-final” agreement contrary to the clear allegations of the Counterclaim.

Issue Five – As a matter of law, trial court erred in holding that Basic Contract was unenforceable because the construction loan agreement closed beyond a ninety-day expiration period.

## Statement of the Case

This action arises from a loan commitment letter generated by Haven Trust Bank of Atlanta, Georgia, and accepted by Appellants Affordable Hospitality Group–Anderson, LLC, (“Affordable”) and Jay Berlye (“Berlye”) on November 6, 2007.<sup>1</sup>

On September 13, 2011, Respondent filed a Verified Complaint (“Complaint”) in the Court of Common Pleas for Anderson County seeking recovery of Four Million One Hundred Twenty Five Thousand Five Hundred Ninety Eight and 66/100 Dollars (\$4,125,598.66) and other relief based upon a promissory note, mortgage, guaranty and other loan documents executed by Haven Trust Bank and Appellants under a construction loan agreement contemplated by the loan commitment letter. (Record, p. 31)

Appellants were served and timely filed their first Answer and Counterclaim on October 26, 2011. Under Rule 15(a) SCRPC, Appellants timely served and filed an Amended Answer and Counterclaim on November 28, 2011. (R., p. 190)

On January 9, 2012, Respondent served and filed its Answer to Appellants’ Counterclaims (R., p. 266) along with a Motion to Dismiss the counterclaims (R., p. 284) pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Practice (SCRPC).

Respondent’s Motion to Dismiss was heard on February 29, 2012. (R., pp. 349-381) Prior to the hearing, both parties served and filed memoranda. (R., p. 418 and p. 436) At hearing, the trial court granted the parties permission for supplemental briefing. (R., p. 376, line 20-p. 378, line 19) Appellants served and filed their

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<sup>1</sup> – In the trial court, Appellants described the commitment as the “Basic Contract.” To preserve the neutrality of this Statement of the Case, the loan commitment letter will simply be referred to as such. In the remainder of this Brief, however, the phrase “Basic Contract” will be used.

supplemental memorandum on April 2, 2012, (R., p.454) and Respondent served and filed a reply brief on April 12, 2012. (R., p. 512)

On November 14, 2012, the trial court issued an Order dismissing Appellant's counterclaims with prejudice. (R., p.13) Appellants timely served and filed a Motion to Alter or Amend Judgment (R., p.286) pursuant to Rule 59(e) SCRPC accompanied by a Motion to Amend their Answer and Counterclaim (R., p.300) pursuant to Rule 15 SCRPC on November 26, 2012. Respondent filed memoranda opposing both motions on May 6, 2013. (R., p. 556 and p. 565)

On June 10, 2013, the trial court issued an Order denying Appellants' Rule 59(e) Motion. (R., p.9) On July 1, 2013, the trial court vacated the Order. (R., p.7)

On September 12, 2013, both of the Appellants' motions were heard. (R., pp. 382-417) Prior to the hearing the parties filed no further memoranda. On September 23, 2013, the trial court signed an Order denying both of the Appellants' motions. (R., p.5) The Order was filed by the Anderson County Clerk of Court on September 30, 2013, and received by the Appellants on October 3, 2013. Notice of Appeal was served on October 28, 2013, and filed by the South Carolina Court of Appeals and the Anderson County Clerk of Court on October 30<sup>th</sup> and October 29<sup>th</sup> respectively.

## **Introduction**

After two years, this proceeding remains stalled at the pleading stage. In the course of this litigation, the trial court has issued the following: (1) an Order dated November 14, 2012, dismissing the counterclaims with prejudice (R., p.13); (2) an Order dated June 10, 2013, (R., p.9) denying Appellants' motion under Rule 59(e) SCRCPP, which order was subsequently vacated on July 1, 2013 (R., p.7); (3) an oral declaration at hearing on September 12, 2013 (R., p.414, lines 2-6); and (4) an Order dated September 23, 2013 (R., p.5) denying Appellants' motions under Rule 59(e) SCRCPP and Rule 15 SCRCPP.

The trial court's rationale for dismissing Appellants' counterclaims has presented a moving target, evolving as follows:

- (1) the initial Order dismissing Appellant's counterclaims, in November 2012, held that Appellants released "all claims and causes of action, including, but not limited to, defenses and counterclaims arising prior to the time of execution of the modification agreement [on November 10, 2009] (R., p.19);
- (2) the next Order in June 2013 held that the Basic Contract was unenforceable as a "non-final" agreement (R., p.11);
- (3) at hearing on September 12, 2013, the trial court declared from the bench that the Basic Contract was "null and void" (R., p.414, lines 2-6);
- (4) the final Order in September 2013 held that the Basic Contract was not binding upon the parties because the offer of a construction loan agreement expired prior to its closing (R., p.2).

The initial Order held that Appellants released not only claims supposedly arising before November 2009 but also all claims that might arise in the future. (R., p.19)

Logically, the premise for the Order could have been one of three mutually exclusive

propositions: (1) the Basic Contract bound the original parties but not Respondent; (2) the Basic Contract bound both the original parties and Respondent, but Appellants “released” Respondent from all its obligations; or (3) the Basic Contract never bound anyone. The Order did not clearly indicate which holding it had adopted. The “release” of claims arising before November 2009 is discussed under Issue Two below, while the “release” of claims arising thereafter is addressed under Issue Three.

On June 10, 2013, the trial court’s Order held that the Basic Contract was unenforceable as a mere “agreement to agree” citing McLaurin v. Hunter, 165 S.C. 411, 164 S.E. 2 (1932). (R., pp.10-11)<sup>2</sup> Regarding the permanent loan and SBA participation to follow successful performance under the construction loan agreement, the Order held that the Basic Contract: “does not contain any terms for these second two “agreements” that Defendants’ now ask this Court to enforce.” (R., p.10) Although the Order was vacated on July 1, 2013, the proposition that the Basic Contract was incomplete survived and is refuted in Issue Four below.

At hearing on September 12, 2013, Appellant’s counsel requested that the trial court clarify which one of the three holdings on the Basic Contract it had adopted in its November 2012 Order. (R., p. 412, lines 11-18.) In response to Appellants’ request, the trial court declared: “I do find that the loan commitment letter slash basic contract does not meet the requirement of such an enforceable contract or agreement; and therefore, it

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<sup>2</sup> – This rationale was obviously inspired by Respondent’s memorandum filed a month earlier in opposition to Appellants’ 59(e) Motion. For the first time in that memorandum, Respondent advanced the new argument that the Basic Contract was a mere “agreement to agree” citing McLaurin. (R., p.560) Respondent’s argument is briefly summarized below under Issue Four.

would be void. Null and void.” (R., p.414, lines 2-6) Issue Four also deals with this finding from the bench.

On September 23, 2013, the trial court held that the Basic Contract did not govern the construction loan agreement because the offer in the Basic Contract expired prior to the construction loan closing. (R., p.2) This “expiration” analysis was not mentioned during the hearing nor in any filed memorandum. This holding also contradicted the oral finding issued at hearing – to wit, that the Basic Contract was null and void. Appellants were given no opportunity to respond to this new rationale, which is discussed under Issue Five below.

At the outset, however, the fundamental error of the trial court was its dismissal of the counterclaims with prejudice in violation of South Carolina standards governing Rule 12(b)(6) SCRPC. Issue One presents this argument.

**Issue One – The trial court went beyond the allegations of the counterclaim to dismiss it, thus violating standards governing dismissal motions under Rule 12(b)(6) SCRPC.**

Appellants' Amended Answer and Counterclaim sufficiently stated their defenses and sufficiently pled ultimate facts supporting recovery on any one of their five counterclaims. Appellants were entitled to proceed to discovery and to trial applying the well-settled standards governing motions to dismiss under Rule 12(b)(6) SCRPC. Appellants request that the trial court's dismissal of their counterclaims be reversed and that this case be remanded to the trial court for further proceedings.

When a 12(b)(6) motion has been filed, the allegations of the nonmoving party are to be presumed true and, where inferences are necessary, they shall be drawn in the light most favorable to that party. Grimsley v. South Carolina Law Enforcement Div., 396 S.C. 276, 721 S.E. 2d 423, 426 (2012); Overcash v. S.C. Elec. & Gas Co., 364 S.C. 569, 572, 614 S.E. 2d 619, 620 (2005). Appellants' allegations, and inferences reasonably deducible therefrom, should have resulted in denial of Respondent's 12(b)(6) Motion. See, e.g., Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009).

On November 6, 2007, Haven Trust Bank offered, and Appellants Affordable and Berlye accepted, a loan commitment letter hereafter designated the Basic Contract. (R., pp. 234) A preamble to the Basic Contract declared, in pertinent part:

Haven Trust Bank (Bank) commits to Affordable Hospitality Group–Anderson, LLC, d/b/a Microtel Inn & Suites to place a loan in conjunction with a 504 loan from the U.S. Small Business Administration (SBA), with the provisions as described in this letter.

(R., p. 235) The offer was subject to such customary standard "boilerplate" as a credit

investigation and analysis, satisfactory documentation and such other terms and conditions as determined by the Bank and SBA.

The "Purpose" of the Basic Contract was stated in Paragraph 2: "To provide construction and permanent first mortgage financing associated with Microtel Inn & Suites to be located on Electric City Boulevard in Anderson, South Carolina." (R., p.235)

The dual goals of construction and permanent first mortgage financing were to be achieved within time periods recited in Paragraph 4:

- a. Construction loan shall be for a period of nine (9) months from the date of closing. Interest will be accrued during the construction period and interest payments will be paid from permanent loan proceeds.
- b. Proposed permanent loan will be for a period of twenty (20) years from the date of closing payable in two hundred and forty (240) installments of principal and interest.
- c. SBA 504 Interim Loan will be for a period of three (3) months.

(R., p.236)

On December 6, 2007, the Small Business Administration (SBA) issued its "Authorization" (SBA Loan #30896669-07) for the proposed SBA 504 loan and designated Appalachian Development Corporation of Greenville, South Carolina, as the Certified Development Company (CDC) for the Microtel project. (R., pp.489-504)

On May 15, 2008, Haven Trust Bank and the Appellants Affordable and Berlye conducted a closing on the construction loan agreement at which time these Appellants executed a promissory note, mortgage, and other loan documents customary and appropriate for the construction phase of the Basic Contract. (R., pp.52-150) At the closing, Appellant Diversified Capital Investment, Group, LLC ("Diversified") executed a guaranty for the construction loan. (R., pp.56-63) From May 2008 until December

2008, the parties performed their respective obligations under the construction loan agreement as contemplated by the Basic Contract.

On December 12, 2008, Haven Trust was closed by the Georgia Department of Banking and Finance and the Federal Deposit Insurance Corporation (FDIC) became Haven Trust's receiver. Appellants continued construction during the receivership. For its part, FDIC agreed to and adopted modifications of the construction loan agreement, including an extension of the maturity date from March to June 2009. (R., p.151-166 and 505-507) In May 2009, the Microtel opened for business.

On or about April 30, 2009, Respondent acquired sixty-one (61) outstanding Haven Trust loans valued at Ten Million One Hundred Ninety Seven Thousand Eight Hundred Forty Eight Dollars (\$10,197, 848) for a sales price of Three Million Two Hundred Sixty Three Thousand Three Hundred Eleven Dollars (\$3,283,848). (R., pp.508-509) Among the loan accounts in this "package" were the Basic Contract and construction loan agreement between Haven Trust and Appellants. In June 2009 and November 2009, Respondent and Appellants executed agreements modifying terms of the construction loan agreement. (R., pp. 247-256 and 257-264) These modification agreements were comparable to the modification agreement between FDIC and Appellants in April 2009, mentioned above.

Almost two years later, on September 13, 2011, Respondent filed its Complaint. It bore the following caption:

Collection on Note  
Collection on Guaranties  
Foreclosure

Exercise of Security Interest  
Recovery of Personal Property  
*Receivership*

(R., p.31)

Nowhere in its pleading nor in its voluminous exhibits (A through O) did the Respondent disclose the existence of the Basic Contract. Cursory reading of the Complaint would suggest that the Appellants' promissory note (Exhibit A, R., p.52), guaranty (Exhibit B, R., p.56) and mortgage (Exhibit D, R., p.86) were stand-alone contracts. The actual construction loan agreement (Exhibit C, R., p.63) was strangely characterized as an instrument executed by Appellants "in further consideration of Haven's extension of funds."<sup>3</sup> (§ 13 Complaint, R., p.33)

The Basic Contract was first brought to the trial court's attention by Appellants' Amended Answer and Counterclaim. (R., pp. 234-246) In their Answer to the Complaint, Appellants alleged that all transactions with Haven Trust Bank were accomplished in continuing reliance upon the terms of the Basic Contract. (§§ 13-199 Amended Answer & Counterclaim [hereinafter "AA&C"], R., pp.193-221) Appellants denied all claims in the Complaint on the grounds that, as successor to Haven Trust Bank through FDIC as receiver, Respondent had violated its own obligations under the Basic Contract. (Id.)

Respondent entered a general denial to all the Appellants' defensive allegations. (§§ 4-61 Resp. Answer, R.pp. 266-274.) Thus, the parties' pleadings placed into issue the

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<sup>3</sup> – In fact, the terms of the construction loan agreement reveal that all the various loan documents contemporaneously executed on May 15, 2008, were executed pursuant to that agreement rather than the agreement serving as "consideration" for unspecified "extension of funds" by Haven Trust Bank.

nature, intent and binding effect of the Basic Contract, especially with regard to Respondent. In such circumstances, the trial court was required to presume the truth of Appellants' allegations and draw all necessary inferences favorably for the Appellants.

Based upon their defensive allegations, Appellants then stated five counterclaims against Respondent as the successor to Haven Trust Bank and FDIC under the Basic Contract: (1) Breach of Contract (¶¶ 213-246 AA&C, R. pp. 223-228); (2) Breach of the Duty of Good Faith and Fair Dealing (¶¶ 247-249 AA&C, R. p. 228); (3) Breach of Contract with Fraudulent Intent (¶¶ 250-257 AA&C, R., pp. 228-229); (4) Violation of the South Carolina Unfair Trade Practices Act (¶¶ 258-260 AA&C, R., p.230); and (5) Tortious Interference with Prospective Contractual Relations (¶¶ 261-272 AA&C, R., pp.230-231). The sufficiency of Appellants' pleading to state these claims is demonstrated below.<sup>4</sup>

#### Breach of Contract

The Basic Contract was a complete, integrated and enforceable contract under the laws of Georgia. There are four elements of an action for breach of contract. Each element is set out below in association with its supporting allegations.

1. Existence of Contractual Obligations. (¶¶ 214–218 AA&C, R., pp.223-224 and Exhibit A, R., pp.234-246)
2. Breach of Contractual Obligations. (236–244 AA&C, R., p. 226-227)
3. Damages. (¶¶ 245–246 AA&C, R., pp.227-228)
4. Damages were the Direct and Proximate Consequence of Breach. (Id.)

#### Breach of Duty of Good Faith and Fair Dealing

It is axiomatic that in every contract there exists an implied covenant of good faith

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<sup>4</sup> –The sufficiency of Appellants allegations was argued to the trial court. (R., pp. 472-474)

and fair dealing. See, e.g., Tharpe v. G.E. Moore Co., 254 S.C. 196, 174 S.E.2d 397 (1970); TechBios, Inc. v. Champagne, 688 S.E.2d 378 (Ga. Ct. App. 2009). Appellants supported their claim with appropriate allegations. (§§ 235–244 and 248 AA&C, R., pp. 226-227 and 228)

#### Breach of Contract Accompanied by a Fraudulent Act

There are three elements of an action for breach of contract accompanied by a fraudulent act. See, e.g., Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985). Each element is set out below in association with its supporting allegations.

1. Breach of Contract. (§§ 222–246 AA&C, R., pp.222-246)
2. Accompanied by a Fraudulent Intent. (§§ 251, 253–254 AA&C, R., pp. 228-229)
3. Accompanied by a Fraudulent Act. (§§ 254–256 AA&C, R., p.229)

#### Violation of the South Carolina Unfair Trade Practices Act

There are three elements of an action for violation of the South Carolina Unfair Trade Practices Act. S.C. Code § 39-5-10 et seq.; Inman v. Ken Hyatt Chrysler Plymouth, Inc., 294 S.C. 240, 363 S.E.2d 691 (1988); Wright v. Craft, 640 S.E.2d 486 (Ct. App. 2006); Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986). Each element is set out below in association with its supporting allegations.

1. The Defendant Engaged in an Unfair or Deceptive Act in the Conduct of Trade or Commerce. (§ 259 AA&C, R., p.230)
2. The Unfair or Deceptive Act Is Capable of Affecting the Public Interest. (Id.)
3. Damages. (§ 260 AA&C, R., p.230).

This case involves more than the mere breach of a contract between the litigants.

Appellants alleged that Respondent's business model was predatory. Specifically, Respondents purchased distressed assets from the FDIC at bargain-basement prices in order thereafter to force the owners of such assets into foreclosure, taking possession of the property and selling the property for an amount which is more than what Respondent paid for it, yet still less than the original amount of the loan. (¶¶ 228, 232, 236-238, 241, 251-256 and especially ¶ 259 AA&C, R., pp.225-229)

Through discovery and trial, Appellants anticipated showing that Respondent, consistent with its business model, never had any serious intention of performing under the Basic Contract. Appellants also anticipated discovering that Respondent has replicated this model throughout South Carolina, if not the United States. In their pleading, Appellants alleged facts sufficient to constitute a cause of action for violation of the South Carolina Unfair Trade Practices Act.

#### Tortious Interference with Appellants' Prospective Contractual Relations

There are three elements of an action for tortious interference with prospective contractual relations. Santoro v. Schulthess, 384 S.C. 250, 681 S.E.2d 897 (Ct. App. 2009); Rendan, Inc. v. Liberty Real Estate Ltd. P'ship III, 444 S.E.2d 814 (Ga. Ct. App. 1994). Each element is set out below in association with its supporting allegations.

1. The Intentional Interference with Prospective Contractual Relations. (¶¶ 262-270 AA&C, R., pp. 230-231)
2. For an Improper Purpose or by Improper Methods. (¶ 271 AA&C, R., p.231)
3. Causing Damages. (¶ 272 AA&C, R., p.231)

Appellants' pleading of its counterclaims was sufficient not only to state ultimate facts but to establish five theories of recovery upon which relief could be granted. It was

plain error for the trial court to dismiss these counterclaims with prejudice.

**Issue Two – The trial court misread Appellants’ pleading to find that their counterclaims arose before November 2009, thereupon erroneously dismissing such counterclaims with prejudice instead of granting leave to amend.**

Small Business Administration (SBA) 504 Funding

Answering the counterclaims, Respondent denied that it could control “whether the SBA loan would issue....” (¶ 24 Resp. Answer, R., p.270) Along with its Answer, on January 9, 2012, Respondent also served and filed a motion to dismiss under Rule 12(b)(6) SCRPC stating a single ground: “Plaintiff cannot be held liable for the funding determination of the Federal SBA.” (R., p.284)

Taking this position, Respondent both misstated and failed to answer Appellants’ counterclaims. In their pleading Appellants had simply alleged a duty of Respondent to assist Appellants in obtaining the SBA 504 Interim Loan contemplated by the parties’ contract. (¶ 227 AA&C, R., p.225) At no time have Appellants claimed that Respondent was responsible for or controlled issuance of SBA 504 loans.

Prior to hearing on February 29, 2012, the parties served and filed memoranda. (R., pp.418-425 and pp. 436-444) The Appellants’ memorandum explained that Respondent’s failure to cooperate in the SBA process and grant the permanent loan as primary lender had simply prevented the SBA 504 interim loan. (R., pp.422-424) See Champion v. Whaley, 280 S.C. 116, 311 S.E. 2d 404 (Ct. App. 1984).

Respondent’s misrepresentation is clearly revealed by a cursory review of the SBA 504 funding program. Through this program, SBA provides small businesses with long-term, fixed-rate financing. See generally 15 U.S.C. § 697 et seq. Typically, 504 loans are structured so that three parties contribute financing to a project’s total cost: one

is the borrower; one is a third-party lender; and one is known as a “certified development company” (“CDC”).

The first step in the process of applying for SBA-backed financing is to obtain a financing commitment from a third-party lender. See 13 Code of Federal Regulations (CFR) § 120.920 (“A Project financing must include one or more Third Party Loans totaling at least as much as the 504 loan.”). In this case, the initial third party lender was Haven Trust Bank.

Once a third party lender is identified, then, through the CDC, the applicant must submit its proposal to the SBA. If the project is approved, SBA will issue an “Authorization” to the CDC to guarantee a portion of the financing. Id. § 120.801(a). On December 6, 2007, SBA authorized the 504 funding contemplated by the Basic Contract. (R., pp.489-504)

Before funds are released, however, SBA requires that the financing application be up-to-date. Id. § 120.960. In the event that the identity of the third-party lender changes, SBA requires that the new lender identify itself and commit to the financing relationship previously represented to the government. (Id.) The failure to do so will preclude SBA funding. (Id.) Upon Respondent’s purchase of Haven Trust loans from FDIC, the Respondent should have become the third party lender. Under the Basic Contract, it was required to do so.

Respondent’s pre-hearing memorandum contained a slight variation upon its earlier SBA argument – that is, Appellants actually could not have qualified for SBA 504 funding. At hearing on February 29, 2012, the matter of SBA 504 funding received brief

mention. (R., p. 374, lines 15-21) It was not adopted as an explicit holding by the trial court.

#### Release of Appellants' Counterclaims

For the first time, Respondent's pre-hearing memorandum introduced a startling new argument for dismissal of the counterclaims – Appellants had actually released those claims as part of the modifications to the construction loan agreement in June and November 2009. (R., pp.436 and 438-440) This argument was nowhere suggested in Respondent's Answer to Appellants' counterclaims. Appellants were taken by surprise. (R., p. 356 line 24-368, line 14)

Given that Appellants had had no opportunity to address the “release” argument, the trial court granted the parties permission for supplemental briefing. (R., p. 376, line 24-378, line 19) The parties filed their supplemental papers, Appellants on April 2, 2012, (R., p.454) and the Respondent on April 12, 2012 (R., p.512).

#### Counterclaims Accruing Before November 2009

On November 14, 2012, the trial court signed its Order dismissing Appellants' counterclaims, filing the same on November 16, 2012. The Order embraced the Respondent's newly minted argument of release: “The crux of LNV's motion is that Defendants released the claims that they now seek to litigate when they entered into a series of loan modifications with LNV and its predecessors.” (R., p.15)

The Order found that: “Based on the Defendant's allegations in the Amended Answer and Counterclaim, Defendants' claims arose prior to November 10, 2009....” (R., p.19) The Order cited three sections from the Answer and Counterclaim, only one of

which actually referred to Respondent's conduct and none of which specified any point of time at which any of the counterclaims arose:

- (1) ¶¶ 214-216 reciting the preamble, purpose and terms of the Basic Contract (R., p.223);
- (2) ¶ 225 describing completion of the Microtel construction in May 2009 and alleging an obligation of Haven Trust to grant the permanent loan under the Basic Contract (R., p.225); and
- (3) ¶¶ 243-244 alleging Appellants' unsuccessful efforts to elicit responses from Respondent regarding its obligations, as successor to Haven Trust Bank under the Basic Contract (R., p.227).<sup>5</sup>

The November 2012 Order did not explain how it inferred that Appellants' claims arose prior to November 2009 from these allegations. In fact, the Appellants' pleading nowhere stated when its counterclaims arose. (¶¶ 200-272 AA&C, R., p.221-231) The trial court's inference that claims arose before November 2009 directly contradicted Appellants' repeated allegations that at all times relevant they anticipated and relied upon Respondent's full performance under the Basic Contract.

Should discovery reveal that in fact Respondent was actually breaching its obligations during the period from May through November 2009, it will also reveal that Appellants did not and could not know of those breaches at the time. At least such would be the reasonable and fair inference to be drawn from Appellants' Answer and Counterclaim. See, e.g., M.B. Kahn Constr. Co. v. S.C. Nat'l Bank, 275 S.C. 381, 271 S.E.2d 414 (1980) (addressing fraudulent inducement); Davis v. Upton, 250 S.C. 288,

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<sup>5</sup> – At this point, the Order abruptly dropped its summary of Appellant's pleading. Later (R., p.19) it did mention paragraph 227 which alleged Respondent's succession to the role of primary lender upon its purchase of outstanding loans from FDIC. When the Order also mentioned ¶¶ 227, 229 and 239, it was not to identify any time frame. Instead, the initial Order rested upon a strained interpretation of two construction loan modification agreements (R., pp.247-256 and 251-264). Under Issue Three below, Appellants will demonstrate why the trial court's interpretation cannot withstand scrutiny.

157 S.E.2d 567 (1967).

Motion to Amend and Plead “Evidentiary Facts”

The November 2012 Order presented to the Appellants yet another possibility: perhaps the trial court had simply misread their pleading. Relying upon Rule 8 SCRPC, Appellants had alleged “ultimate facts” anticipating that discovery would reveal more precisely when Respondent: decided to breach the Basic Contract and its duty of good faith and fair dealing; formed its fraudulent intent and accomplished its fraudulent acts; violated SCUTPA; and perfected its tortious interference with Appellants’ prospective contractual relations.

Given the pleadings before the trial court, the probability was high that in fact Respondent’s misconduct extended far beyond November 2009. After all, the pleadings clearly revealed an unexplained gap of almost two years between the November 2009 construction loan modification and commencement of this action in September 2011. Having purchased the outstanding Haven Trust loans in May 2009, and believing it had obtained a “release” of all possible counterclaims in November 2009, why did Respondent wait for two years to foreclose the note, mortgage and guaranty? The inescapable inference is that, for some reason, the parties were engaged in some course of dealing. Appellants’ allegations, if presumed to be true, clearly charged conduct by Respondent consistent with a predatory business model.

The pleading of “ultimate facts” presents a perennial risk that trial courts might incorrectly construe the allegations. In Watts v. Metro Sec. Agency, 346 S.C. 235, 550 S.E. 2d 869 (Ct. App. 2001), Judge Goolsby aptly characterized “ultimate facts” as

difficult to define: “Ultimate facts fall somewhere between the verbosity of evidentiary facts and the sparsity of ‘legal conclusions.’” 550 S.E. 2d at 871.

The remedy for such trial court misinterpretations is supplied by liberal grants of leave to amend under Rule 15(a) SCRPC and cases applying it. Therefore, Appellants filed a Motion to Amend their pleading along with their 59(e) Motion in order to provide the trial court with evidentiary facts demonstrating that the counterclaims arose after November 2009. Appellants offered a Second Amended Answer and Counterclaim. (Exhibit A to Motion to Amend.) Electing “the verbosity of evidentiary facts,”

Appellants placed before the trial court the following information:

- (1) on November 10, 2009 (the same day as the construction loan modification) Respondent announced that “committee approval” had been obtained for the new commitment letter (§ 236);
- (2) on November 11, 2009, Respondent pledged to send the new commitment letter to Appellant Berlye (§ 237);
- (3) in December 2009, SBA granted a one-year extension of its 504 funding authorization (§ 239);
- (4) in January 2010, Respondent sent to Appellants a “redline” version of the new commitment letter which replicated the Basic Contract (with Respondent, obviously, as primary lender) (§§ 240 & 241);
- (5) in February 2010, the parties prepared for closing on the permanent loan (§§ 242 & 243);
- (6) in March 2010, closing was delayed to enable Appalachian Development Corporation, as CDC for SBA, to complete review of documentation and sale of its 504 debenture (§ 244);
- (7) from April until July 2010, Respondent was unresponsive to communications from Appellants, but resumed communications on July 12, 2010, directing Appellants to work with a hotel consultant of Respondent’s choice (§ 245);

(8) desultory communications continued through September and October 2010 until November 2010 when Respondent once again affirmed its intention to work with Appellants under the Basic Contract (§ 246);

(9) in November 2010, SBA granted a final extension of its 504 authorization through December 2011 (§ 247);

(10) from November 2010 until filing of this action, the parties continued their inconclusive negotiations (§ 248).

(R., pp.340-342)

On September 23, 2013, the trial court denied Appellants' Motion to Amend without stating any grounds. (R., p.5) Failing to provide a rationale, the trial court ignored the directive of Rule 15(a) SCRCF: "leave [to amend] shall be freely given when justice so requires and does not prejudice any other party."

Prevention of "prejudice" to the nonmoving party under Rule 15(a) SCRCF contemplates the following:

The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. The party opposing the amendment has the burden of establishing prejudice. This rule strongly favors amendments and the court is encouraged to freely grant leave to amend.

Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 286, 667 S.E. 2d 711, 716-717

(Ct. App. 2005).

On May 6, 2013, Respondent had filed a memorandum opposing the Motion to Amend, claiming it would be prejudiced:

The operation of the hotel (the subject of this action) was so poor that the parties agreed to have a receiver appointed to operate the hotel – at Plaintiff's expense. Every month of delay harms Plaintiff by causing it to lose the revenue on its loan and pay the costs of the receiver to operate the facility.

(R., p.568)

The Record contains no evidence whatsoever regarding poor management of the Microtel. To the contrary, Appellants alleged that they had: “operated the Microtel prudently in performance of the Basic Contract anticipating performance by the Plaintiff as successor to Haven Trust Bank.” (§ 235 AA&C, R., p.226)

The receivership was established by a consent order reciting no facts at all, much less any finding of “poor operation” at the Microtel. The same consent order did not direct Respondent to pay costs but instead stated that: “The compensation of the Receiver shall be at the discretion of the Court and shall be finally determined by the Court.” (§ 18 of the Order, R., p.28) Given that Respondent’s claims of “prejudice” were completely unsupported by the record, it was plain error of the trial court to deny Appellants’ motion to amend.

As described above, the proposed Second Amended Answer and Complaint supplied sufficient evidentiary allegations to preclude any finding that Appellants’ counterclaims arose before November 2009 or could have been released at that time. Even though Appellants’ original pleading of counterclaims (presenting “ultimate facts”) should not have been dismissed, it is beyond dispute that denial of the above described amendments ignored the demands of justice in this case.

**Issue Three – The trial court improperly interpreted modifications of the construction agreement as releases of performance under the Basic Contract and any claims of breached performance that might arise in the future .**

As noted above, the November 2012 Order held that: “Defendants granted the broad release of all claims and causes of action, including, but not limited to, defenses and counterclaims arising prior to the time of execution of the modification agreement.” (R., p. 19, emphasis added.) Within a single sentence, the Order simultaneously held not only that all the Appellants’ claims arose before November 10, 2009 but also that Appellants had prospectively released any and all claims that might arise in the future.

Appellants timely served and filed a Motion to Alter or Amend Judgment under Rule 59(e) SCRPC. In part, the motion sought to construe properly the June and November 2009 loan modification agreements.

Appellants had alleged that at no time during the negotiation of either the June 2009 or the November 2009 modifications of the construction loan agreement did Respondent propose any modification of the Basic Contract, much less any changes to the terms calling for three successive transactions. (¶ 234 AA&C, R., p.226) The Respondent admitted this allegation, albeit limiting the admission “to the extent consistent with the terms of the referenced documents.” (¶ 31 Resp. Answer, R., p.271) The terms of the referenced construction loan modifications are indeed consistent with Appellants’ allegation, as demonstrated below.

It could be said that the parties’ pleadings have essentially stipulated that neither modification to the construction loan agreement was intended to modify the Basic Contract. Moreover, Appellants have alleged that these modification agreements were

interpreted as indications of Respondent's intended good faith performance under the Basic Contract. (¶¶ 230, 233-234 and 235 AA&C, R., p. 226) The November 2012 Order had failed both to treat Appellant's allegations as true and to draw all inferences most favorably for the Appellants. It had done precisely the opposite.

Accordingly, Appellants requested that the court reconsider or, in the alternative, amend its Order to reconcile its holdings with the admission in both parties' pleadings that neither the June 2009 nor November 2009 modifications were intended to waive performance of the three successive transactions contemplated by the Basic Contract. (R., pp.293-298)

The November 2012 Order was also inconsistent with the express provisions of the modifications. Neither the June 2009 nor the November 2009 modifications of the construction loan agreement can be deemed a release of Plaintiff's performance under the Basic Contract.

The only reference to the Basic Contract in either modification is found in the June 2009 agreement. By way of explanation, the June 2009 modification was designed to grant Respondent direct access to a certificate of deposit (CD) that had constituted collateral under the Basic Contract. Under the modification agreement, the CD would be converted into a cash reserve while the parties negotiated the remaining performance under the same Basic Contract:

Notwithstanding anything to the contrary contained in the Loan Documents, including, without limitation, the [FDIC modification dated April 20, 2009], the \$100,000 certificate of deposit presently held as additional collateral **for the permanent loan** shall be transferred into a cash reserve account held by Lender or an affiliate of Lender. Such cash

reserve account shall continue to be additional security for the Loan; however, Borrower hereby authorizes Lender to apply funds immediately from such cash reserve account to pay Loan interest due to July 1, 2009 and thereafter, to the extent that cash flow from operations at the Mortgaged Property cannot satisfy the monthly interest payment due, funds from such cash reserve account may be applied to the net remaining interest payment due on the Loan **until such time as the Small Business Administration funds its new subordinate loan** at which time such funds may be used to pay closing costs (e.g., title premiums, lender costs, attorneys' fees for Lender and Borrower, SBA loan points or fees if any, appraisal and inspection fees if any, survey costs, etc.) **in connection with the closing of the permanent loan, the SBA Loan,** or as otherwise determined by Lender.

(¶ 1(b) Exhibit B to AA&C, R., p.249– emphasis added to language anticipating the permanent loan.)

It is worth noting that in April 2009, Appellants and FDIC executed a similar modification to the construction loan agreement which, in pertinent part, provided that the same certificate of deposit would be retained by FDIC “as collateral for the permanent loan on the Property and shall not be released by Receiver until the earlier of the payment in full of the permanent loan or as otherwise determined by Receiver.” (¶ 3.1 Exhibit I to Complaint, R., p. 155) In other words, Appellants were justified in relying upon the April, June and November modifications to the construction loan agreement as part of performance by the parties under the Basic Contract.

The releases contained in the June 2009 and November 2009 modifications are identical. They also resemble closely – but are far less exhaustive than – the release provisions found in the April 2009 modification executed by Defendants and FDIC:

Receiver, Borrower and Guarantors hereby ratify the Loan Documents, waive any defenses thereto and RELEASE AND DISCHARGE Receiver and its predecessors, successors, assigns, officers, managers, directors,

employees, agents, attorneys, representatives and affiliates, but specifically excluding any purchaser or assignee of the Loan (collectively referred to as “***Receiver Affiliates***”), jointly and severally from any and all claims, counterclaims, demands, damages, debts, agreements, covenants, suits, contracts, obligations, liabilities, accounts, offsets, rights, actions and causes of action of any nature whatsoever, including, without limitation all claims, demands, and causes of action for contribution and indemnity, whether arising at law or in equity (including without limitation, claims of fraud, duress, mistake, tortious interference or usury), whether known or unknown, whether liability be direct or indirect, liquidated or unliquidated, whether absolute or contingent, foreseen or unforeseen, and whether or not heretofore asserted or because of or as a result of any act, omission, communication, transaction, occurrence, representation, promise, damages, breach of contract, fraud, violation of any statute or law, commission of any tort, or any other matter whatsoever or thing done, omitted or suffered to be done by Receiver or Receiver Affiliates, which have occurred in whole or in part, or were initiated at any time up to and through the date this Agreement is signed and delivered to Receiver.

(¶ 2.3 Exhibit I to Complaint, R.,pp.154-155 – italics and bold font in the original.)

In a footnote to its initial Order, the trial court noted the April 2009 agreement yet did not explain why, in light of that release, all parties (including Respondent upon purchasing the Haven Trust loan portfolio) continued to act as if the Basic Contract were still in effect and binding. Appellants requested that the court amend its Order to account for the continuing course of conduct by all parties after April and June 2009. If the November 2009 modification of the construction loan agreement could be read as such a complete release of performance under the Basic Contract, then the April 2009 and June 2009 modifications should be amenable to the same interpretation.

Except for the provisions in the June 2009 regarding the certificate of deposit, the modifications in June 2009 and November 2009 are identical in their organization and language. From the original recitals through definitions and repeatedly in the substantive

provisions, both instruments of modification limit themselves to the construction loan agreement. A complete and exhaustive listing of these provisions is impractical, but the following provisions are illustrative:

In Recital A, the “Note,” the “Loan” and the “Mortgage” are clearly identified as instruments executed on May 15, 2008, which constituted the construction loan agreement, with no reference whatsoever to the Basic Contract or commitment letter of Haven Trust Bank. (R., pp. 248 and 258)

In Recital B, the FDIC “first” modification in April 2009 is limited in its application to the “Loan” (the construction loan) mentioned above. The same Recital B in the November modification is limited to the same “Loan.” Nowhere does Recital B refer to the Basic Contract or commitment letter of Haven Trust Bank. (R., pp. 248 and 258)

In Recital C, the “Loan Documents” are identified as documents “executed and/or delivered in regard to the Loan” – meaning the construction loan agreement of May 15, 2008. Nowhere does Recital C refer to the Basic Contract or commitment letter of Haven Trust Bank. (R., pp. 248 and 258)

In Recital F, the intention of the parties is expressly limited to the “Note,” the “Mortgage” and “any other Loan Documents as set forth herein.” Nowhere does Recital F refer to the Basic Contract or commitment letter of Haven Trust Bank. Nor do subsequent provisions of these modifications, except for the language cited above from the June 2009 modification. (R., pp. 248 and 258)

¶ 3 of the modifications contained the release upon which the trial court based its Order, yet that release was itself similarly limited to the “Loan,” “the Note and/or the Mortgage” and “any other Loan Document” clearly referring to the instruments in Recitals A and C. Nowhere did ¶ 3 refer to the Basic Contract or commitment letter of Haven Trust Bank. (R., pp. 249-250 and 259)

¶ 4(a) of the modifications confirmed that Appellants, as of November 10, 2009, had no “defense, counterclaim or offset to the Loan or any of the Loan Documents,” which was a correct statement of fact simply because it pertained only to the construction loan agreement clearly identified in Recitals A and C. Nowhere did ¶ 4(a) refer to the Basic Contract or commitment letter of Haven Trust Bank. (R., pp. 250 and 259)

¶ 10 of the modifications declared that the given loan modification agreements together with other documents “entered into in regard to the Loan” was final and complete, not to be contradicted by evidence of prior, contemporaneous or subsequent “oral agreements.” Clearly this provision governed relations of the parties with respect to the “Loan” and not the Basic Contract or commitment letter of Haven Trust. Nowhere, in fact, did ¶ 10 refer to the Basic Contract or commitment letter of Haven Trust Bank. (R., pp. 251 and 260)

¶ 12 of the modifications contained a waiver of jury trial, again limited to “this Agreement, the Note or any of the other Loan Documents.” Nowhere did ¶ 12 refer to the Basic Contract or commitment letter of Haven Trust Bank. (R., pp. 251 and 261)

As the trial court itself noted, a release is merely a form of contract, Bowers v. Dep’t of Transp., 360 S.C. 149, 153, 600 S.E.2d 543, 545 (Ct. App. 2004). Therefore, the intention of the parties is controlling, S. Glass & Plastics Co. v. Duke, 367 S.C. 421, 428, 626 S.E.2d 19, 20 (Ct. App. 2005). In fact, the Supreme Court has held that a release is effective only as to claims “within the contemplation of the parties.” Gardner v. City of Columbia Police Dep’t, 216 S.C. 219, 223, 57 S.E.2d 308, 310 (1950). The pleadings and exhibits before the trial court clearly demonstrated that the parties to the June and November 2009 construction loan modifications never intended to modify, much less release, performance under the Basic Contract.

To the extent that the November 2012 Order stretched the limited release in the November 2009 construction loan modification to encompass the entire Basic Contract (never mentioned once in that instrument) the November 2012 Order achieved a result never intended by the parties and should be reversed.

**Issue Four – As matter of law, trial court erred in holding that Basic Contract was unenforceable as a “non-final” agreement contrary to the clear allegations of the Counterclaim.**

The Respondent’s memorandum opposing Appellants 59(e) Motion (dated May 6, 2012) argued for the first time that the Basic Contract was unenforceable as a mere ‘agreement to agree’ under such South Carolina cases as McLaurin v. Hunter, 164 S.E. 2d (1932). (R., p. 560) A month later, an Order (dated June 10, 2013) denied Appellants’ 59(e) Motion on grounds previously stated, adding for the first time a holding that the Basic Contract was a “non-final agreement” citing McLaurin. (R., pp.10-11) This Order was subsequently vacated on July 1, 2013.

Although the June 2013 Order was vacated, the argument that the Basic Contract was, or became, unenforceable survived. At hearing on September 12, 2013, the trial court unequivocally declared that the Basic Contract was “null and void.” (R., p.414, lines 2-6) To the contrary Appellants’ pleading, exhibits and memoranda established that the Basic Contract was a binding agreement under both Georgia and South Carolina law. By its own terms (§ 21, R., p.242), the Basic Contract was to be governed by Georgia law.

Appellants’ showing can be summarized as follows:

1. Offer. Haven Trust Bank prepared and sent the Basic Contract to Appellants on November 6, 2007. (§ 214 AA&C, R., p.223 ); see also Carolina Amusement Co. v. Conn. Nat’l Life Ins. Co., 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993); Rakusin v. Radiology Assocs. Of Atlanta, P.C., 699 S.E.2d 384 (Ga. 2010).

2. Acceptance. Appellants accepted the Basic Contract on November 6, 2007. (§ 218 AA&C, R., p.224); see also Carolina Amusement Co. v. Conn. Nat’l Life Ins. Co., 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993); Ga. Code § 13-3-1.

3. Mutual Assent. Not only did Appellants and Haven Trust execute the Basic Contract, but subsequently performed their obligations. (§§ 219-221 AA&C, R., p.224)

See also Edens v. Laurel Hill, Inc., 271 S.C. 360, 247 S.E.2d 434 (1978); Ga. Code § 13-3-1.

4. Consideration. In reliance on the validity and enforcement of the terms and conditions of the Basic Contract, Appellants expended significant amounts of money, to include posting a \$100,000 certificate of deposit as security for performance and paying \$10,000 as an expense deferment fee. (¶¶ 9 & 25 Exhibit A to AA&C, R., pp.237 and 242); see also Carolina Amusement Co. v. Conn. Nat'l Life Ins. Co., 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993); Ga. Code § 13-3-1.

The trial court unequivocally declared the Basic Contract null and void. Even accepting this unqualified and unsupported declaration as correct, the detailed acts of performance would be sufficient under Georgia and South Carolina to affirm the agreement. Soon after accepting the Basic Contract, Appellants paid Haven Trust Bank \$10,000 as the “expense deferment fee.” (¶ 25 Exhibit A to AA&C, R., p.242). On December 6, 2007, Appellants received SBA authorization for 504 funding of permanent financing for the Microtel. (R., pp.247-256) On May 15, 2008, Appellants and Haven Trust Bank executed the loan construction agreement and loan documents in furtherance of the Basic Contract. (¶ 219 AA&C, R., p.224) Haven Trust Bank disbursed millions of dollars to Appellants for the development of the hotel. (¶ 221 AA&C, R., p.224). Appellants posted a \$100,000 certificate of deposit as performance security in furtherance of the Basic Contract. (R., p.507 – FDIC Case Update Notification) Most importantly, Appellants unreservedly alleged that they and Haven Trust Bank completely performed all Basic Contract obligations from November 2007 until December 2008. (¶¶ 218–21 AA&C, R., pp.224-225) Appellants’ allegations of performance preclude dismissal on grounds that the Basic Contract failed as a binding agreement.

In its May 2013 memorandum, Respondent claimed that the Basic Contract did

not require issuance of a permanent SBA-backed loan: “the Loan Commitment Letter *contains no such language.*” (R., p.559 – emphasis in original.) The June 2013 Order accepted this argument. (R., pp.10-11)

Yet the preamble to the Basic Contract directly refuted Respondent’s false assertion:

Haven Trust Bank (Bank) commits to Affordable Hospitality Group–Anderson, LLC, d/b/a Microtel Inn & Suites to place a loan in conjunction with a 504 loan from the U.S. Small Business Administration (SBA), with the provisions as described in this letter.

(R., p.235 – emphasis added.)

The Basic Contract was not an “agreement to agree” but an agreement to perform under its terms. Since permanent financing was contingent upon successful performance under the construction loan agreement, Respondent’s claim that the Basic Contract did not guarantee a permanent loan constituted a correct statement of the obvious. Nevertheless, Haven Trust Bank had committed itself to grant such a permanent loan upon Appellant’s successful performance under the construction loan agreement. In common parlance, this is known as a binding contract term.

As most agreements, the Basic Contract contemplated performance yet to be performed. Simply put, the Basic Contract called for future performance. On this basis, Respondent invoked McLaurin to the effect that contracts are not binding if material terms are “left for future settlement.” 164 S.E. 2d at 5. (R., p.560) The Basic Contract, however, left no material terms to the future; it left performance to the future.

This Brief will spare this Court the tedium of reviewing in detail the Basic

Contract language cited by Respondent's memorandum. No final order of the trial court rested upon Respondent's memorandum. Briefly summarized, in characterizing the Basic Contract as incomplete, Respondent emphasized standard "boilerplate" provisions, phrases such as "the proposed permanent loan" and the requirement for "final approval" of Appellants' construction loan performance before granting the permanent loan.

It bears repeating that this litigation remains stalled at the pleading stage. The record is devoid of any basis in law to conclude that Appellants failed adequately to perform under the loan construction agreement. Only because Respondent delayed and ultimately failed and refused to discharge its obligations, as successor to Haven Trust Bank and the FDIC, is it impossible at this time to determine whether or not final approval for the permanent loan would have been granted under the Basic Contract. Dismissal of Appellants' counterclaim on the basis of speculation blatantly violated Rule 12(b)(6) SCRPC.

**Issue Five – As a matter of law, trial court erred in holding that Basic Contract was unenforceable because the construction loan agreement closed beyond a ninety-day expiration period.**

On September 23, 2013, the trial court issued its Order declaring: “the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered.” (R., p.5)

The September 2013 Order also held that since the closing on the construction loan agreement had occurred beyond a ninety (90) day expiration period in the Basic Contract, none of the Basic Contract obligations applied to the construction loan agreement. The holding needs to be quoted in its entirety:

Inasmuch as terms of the document relied upon by the Defendants, dated November 6, 2007, expressly provided that: “If this loan is not closed within ninety (90) days from the date of acceptance, this Commitment will expire,” and the loan was not closed within such time, i.e., February 4, 2008, no valid enforceable obligation arose between the parties. *Fender & Latham, Inc. v. First Union of South Carolina*, 316 S.C. 48, 446 S.E. 2d 448 (Ct. App. 1994). It would be *petitio principii* to argue that the subsequent loan transaction, closed May 15, 2008 – and ultimately defaulted upon by the Defendants after Haven Trust Bank was placed in receivership by the FDIC – created any obligation not expressly provided for in that loan transaction. *First Union Morag. Corp v. Thomas*, 317 S.C. 63, 451 S.E. 2d 907 (Ct. App. 1994). Moreover, any events allegedly occurring after the former offer expired would be insufficient to constitute a cause of action based on that offer. Rule 12(b)(6) SCRPC.

(R., p.6)

At hearing on September 12, 2013, the trial court had declared that the Basic Contract was null and void but no reference was made to the ninety (90) day expiration period. (R., p.414, lines 2-6) Appellants were denied any opportunity to respond to this

new proposition which seems to have controlled the trial court's final Order.

Because the present action is stalled at the pleadings stage, there is no evidence to explain why Haven Trust Bank and Appellants closed the construction loan agreement in May 2008. Perhaps the parties meant to reaffirm the Basic Contract, despite expiration of the ninety-day offer period, or perhaps the parties indeed meant to create a stand-alone construction loan agreement free from any terms of the Basic Contract. Either conclusion, based on the Record before this Court, remains pure speculation.

From execution of the Basic Contract (in November 2007) through closing of the construction loan agreement (May 2008), the contractual relations between Haven Trust Bank and the Appellants were indisputably governed by Georgia law. The Basic Contract declared: "This commitment shall be construed according to and governed by the laws of the state of Georgia." (§ 21 Exhibit A to AA&C, R., p.242) The construction loan agreement was itself to be governed by Georgia law, except for procedural matters in perfection and enforcement of the lender's rights. (Article VI, ¶ 12, R., p.83) <sup>6</sup>

The final Order cited no authority (from Georgia or South Carolina) that would have prevented the parties to the Basic Contract from renewing their agreement despite expiration of the ninety (90) day offer period. To the contrary, "[p]art performance, the doing of contemplated acts, can furnish the required consideration and mutuality otherwise lacking." Franklin v. UAP/GA. AG. Chem. Inc., 514 S.E. 2d 241, 244 (Ga. App. 1999); Roberson v. Eichholz, 462 S.E. 2d 382 (Ga. App. 1995).

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<sup>6</sup> – This provision, however, also contained a clause directing that in a contest concerning any particular aspect of the agreement, the law which would uphold the contract would be applied without regard to the jurisdiction of origin.

As demonstrated above under Issue Three, Haven Trust Bank and Appellants engaged in full performance under the Basic Contract throughout the period from November 2007 through May 2008. Closing the construction loan agreement was merely another act of performance under the Basic Contract, which was followed by numerous others up until December 12, 2008.

In treating the construction loan agreement as a stand-alone contract, the trial court fantasized a transaction that makes no commercial sense. It is difficult to imagine a prudent borrower entering into a nine-month construction loan agreement to construct a business, which loan would be payable in full (principal and interest) the day the business opened. By the same token, it is difficult to imagine a prudent lender granting such a loan with any expectation of timely repayment.

The pleadings themselves suggest that Haven Trust Bank and the Appellants intended to reaffirm the Basic Contract when they closed the construction loan agreement. In their original Answer, Appellants alleged that each of the construction loan documents (promissory note, mortgage, guaranty, etc.) were executed in reliance upon the Basic Contract. (¶¶ 13 through 26 AA&C, R., pp. 193-196 ) With regard to these allegations, Respondent entered a general denial. (¶ 2 Resp. Answer, R., p.266)

Appellants' counterclaims specifically rested upon allegations that the loan documents executed in May 2008 were "in partial performance of the parties' Basic Contract...." (¶ 219 subsequently incorporated in ¶ 247, 250, 258 and 261 AA&C, R., pp. 224 and 228-230) The following paragraph emphasized that: "All the instruments listed above, together with subsequent obligations undertaken by Defendants, were executed

and entered into by Defendants in good faith reliance upon expected performance by the parties of their obligations under the Basic Contract.” (¶ 220 subsequently incorporated in ¶ 247, 250, 258 and 261 AA&C, R., pp. 224 and 228-230)

Finally, Appellants’ counterclaim also alleged:

From May 2008 until December 2008, the parties performed their respective duties under the Basic Contract, from time to time advancing and disbursing funds, accomplishing construction of the planned hotel, providing progress reports and other documentation as well as other actions contemplated by the Basic Contract.

(¶221 subsequently incorporated in ¶ 247, 250, 258 and 261 AA&C, R., pp.224-225 and 228-230.) Respondent answered that it was “without sufficient information to form a belief” with regard to any of the foregoing allegations. (¶¶ 16 through 18 Resp. Answer, R., p.269) In other words, Respondent was agnostic with regard to the course of dealing between Haven Trust Bank and Appellants.

In short, nothing in the record of this case even suggests that the loan construction agreement was concluded for any other reason than continued performance under the Basic Contract. Given the well-settled standards governing application of Rule 12(b)(6) SCRPC, the trial court should have accepted as true all the Appellants’ allegations and should have drawn the inference that Haven Trust Bank and the Appellants reaffirmed the Basic Contract by closing the construction loan agreement and by subsequently performing their mutual obligations.<sup>7</sup> The trial court holding that the Basic Contract

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<sup>7</sup> – The trial court cited two South Carolina cases: Fender & Latham, Inc., v. First Union of South Carolina, 316 S.C. 48, 446 S.E. 2d 228 (Ct. App. 1994) and First Union Mortg. Corp. v. Thomas, 317 S.C. 63, 451 S.E. 2d 907 (Ct. App. 1994). These cases are equally inapposite to this case, and their selection remains unexplained. At hearing, Counsel for Appellants attempted to alert the trial court to the fact that Georgia law governed the Basic Contract and to suggest that Georgia cases would be more appropriately cited. (R., p. 415, lines 15-21.)


could not govern the construction loan agreement of May 15, 2008, must be reversed.

**Conclusion**

For reasons stated, this Court should reverse the judgment of the trial court.

March 13, 2014

Respectfully submitted,

A handwritten signature in black ink, reading "Ronald M. Childress". The signature is written in a cursive style and is positioned above a horizontal line.

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Case No. 2011-CP-04-2728

LNV Corporation,  
Respondent,

v.

Affordable Hospitality  
Group-Anderson, LLC, Diversified  
Capital Investment Group, LLC, and Jay Berlye,  
Appellants.

CERTIFICATE OF SERVICE

The undersigned certifies that the Appellants' Final Brief was served upon all counsel of record this \_\_\_\_ day of March 2014, by depositing copies of same in the United States mail, postage prepaid, and addressed as follows:

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**SC Court of Appeals**



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Jay Berlye

## Certificate of Counsel

The undersigned Attorney for Appellants hereby certifies that the Final Brief of the Appellants, served and filed on March 17, 2014, complies with Rule 211(b) of the South Carolina Appellate Court Rules (SCACP) and is identical to the initial brief previously served under Rule 208 SCACP.

A handwritten signature in black ink, reading "Ronald M. Childress", written in a cursive style. The signature is positioned above a horizontal line.

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