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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Marvin H. Dukes III, Master in Equity

Case No. 2011-CP-07-1933

Deep Keel, LLC, ... Respondent,

v.

Atlantic Private Equity Group, LLC, Terry L. Rohlfing, Jerry T. Caldwell, and Bluffton Village Town Center Property Owners' Association, Inc., ... Defendants,

Of Whom Atlantic Private Equity Group, LLC, Terry L. Rohlfing, and Jerry T. Caldwell are the . . . . . Appellants.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This appeal involves the foreclosure and collection of a commercial Note and Mortgage. The debtor Atlantic Private Equity Group, LLC, (Appellant) admits its failure to repay amounts owing under a loan originally made by Community FirstBank and secured by certain property as evidenced by a duly recorded Mortgage. Subsequent to the commencement of the suit, the debt was assigned to Deep Keel, LLC, (Respondent) substituted as Plaintiff by Order of the Court.

This action was commenced by Community FirstBank on April 25, 2011, to bring a cause of action for foreclosure with deficiency demanded against Atlantic Private Equity Group, LLC, and for breach of guaranty against Terry L. Rohlfing and Jerry T. Caldwell (hereinafter collectively Appellants).[1] By Order entered April 17, 2013, and with the consent of the parties, the matter was referred to the Beaufort County Master in Equity, Marvin H. Dukes III, to hear the foreclosure action. Upon disposition of the foreclosure action, the case is to be returned to the Circuit Court for any issues triable by jury as against the individual Defendants Terry L. Rohlfing and Jerry T. Caldwell on their respective guaranties.

By further Order entered April 17, 2013, Deep Keel, LLC, (hereinafter Respondent) was substituted as Plaintiff, due to the assignment of all rights, title and interests to the Note, Mortgage, and other loan documents to said entity.

On June 18, 2013, Respondent served and filed a Notice of Foreclosure Hearing,

[1]Subsequent to the commencement of the suit, Community FirstBank merged with Crescent Bank, and the name of the surviving entity was changed to CresCom Bank (hereinafter referred to as the Bank). This merger is evidenced by the Articles of Merger filed on record with the South Carolina Secretary of State on July 29, 2011, and filed of record with, *inter alia*, the Office of Register of Deeds for Beaufort County, South Carolina in Book 3098, page 1545 on November 15, 2011.

including notice of its intent to submit written testimony at the foreclosure hearing.

The foreclosure hearing was held on July 10, 2013. Respondent proffered written testimony as well as live testimony from Scott Bynum, sole member of Respondent. No Appellants attended the hearing, although counsel for the Appellants was present and participated in the hearing.

The Master in Equity issued the Master's Report and Judgment of Foreclosure and Sale on July 29, 2013. Appellants filed a Motion for Reconsideration, which Respondent opposed by Memorandum in Opposition filed August 22, 2013. Thereafter, the Master in Equity issued an Amended Master's Report and Judgment of Foreclosure and Sale, and the property at issue was sold at public auction.

Appellants served their Notice of Appeal on October 10, 2013.

ARGUMENT

I. Standard of Review

"The admission of evidence is withing the trial court's discretion. The court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law. R & G Constr., Inc., v. Lowcountry Regional Trans. Authority, 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct.App. 2000) (citations omitted). "[T]o warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice." Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

II. The Court properly admitted the Note, Mortgage, Assignment of Leases Rents and Profits, Loan Modification Agreements, and Partial Release.

The Appellants assign error to the Master's admission of several loan documents: the Promissory Note [R. pp. 113-114]; Mortgage [R. pp. 116-124]; Assignment of Leases, Rents and Profits [R. pp. 126-130]; Loan Modification Agreement dated April 23, 2009 ("First Modification") [R. p. 132]; Loan Modification Agreement dated May 24, 2010 ("Second Modification") [R. p. 134]; (collectively referenced herein as the "Loan Documents") and the Partial Release of Mortgage and Assignment of Leases, Rents and Profits ("Partial Release") [R. pp. 136-137]. While the Appellants' assignment of error relies upon hearsay grounds, the Appellants' arguments commingle the issue of authentication with that of hearsay.[2]

The original Loan Documents were proffered at trial and made available to Appellants. [R. p. 42, ll. 19-24; p. 43, ll. 13-15]. With the consent of the Appellant, copies of the Loan Documents were substituted for the originals in the record. [R. p. 56, ll. 18-21]. The Note and Modifications thereto are self-authenticating commercial paper. There is no dispute that the Respondent is the holder of that commercial paper. Rule 902, SCRE, states, in relevant part, "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to . . . [c]ommercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law." Rule 902(9), SCRE. Pursuant to §3-308 of the South Carolina Uniform Commercial Code, the mere production of the Note is *prima facie* evidence of its authenticity and the obligations thereunder. S.C.

[2]It is not clear that the Appellants preserved the issue of authenticity of the Loan Documents, as copies of the Loan Documents in lieu of the originals were admitted into evidence without objection of Appellants [R. p. 56, ll. 18-21].

Code § 36-3-308 states, in relevant part, "[i]n an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings."

Moreover, the Mortgage and the Assignment of Leases, Rents and Profits are self-authenticating. Both are acknowledged documents and recorded in the Register of Deeds Office for Beaufort County. Rule 901(b)(7), SCRE; Rule 902(8), SCRE. Likewise, the Partial Release of Mortgage and Assignment is recorded in the Register of Deeds Office for Beaufort County, and does not bear the signatures of any Defendant below.[3]

Appellants' Answer did not specifically deny the genuineness of the signatures on the documents, nor did the Appellants ever assert any issues of forgery. In fact, the Answer admits that Appellant Atlantic Private Equity Group, LLC, borrowed money, entered into a loan with Community FirstBank, and failed to make payments. [R. p. 34, ¶¶ 9, 13; p. 44, ll. 8-9]. Moreover, the Answer merely craves reference to the original Loan Documents, and denies only those allegations "inconsistent therewith." [R. p. 34, ¶ 9]. " A general denial will not raise the issue of the genuineness of a signature on an instrument. Failing to specifically deny the validity of the signature, appellant is deemed to have admitted the signature . . . ." National Equipment, Ltd. v. David Jones Sales, Trucking Division, Inc., 268 S.C. 551, 555, 235 S.E.2d 125, 127 (1977) (citing Farmers & Merchants State Bank v. Mann, 203 N.W.2d 173 (S.D.1973); Bentz v. Mullins, 24 Ohio App.2d 137, 265 N.E.2d 317 (1970)). See also Conran v. Yager, 263 S.C. 417, 211 S.E.2d 228 (1975).

[3]The Partial Release was recorded by the Bank pursuant to the sale of one of the mortgaged properties during the pendency of the suit but prior to the purchase of the loan and Assignment to Respondent. The parties do not dispute that this parcel was released from the Mortgage.

Appellants did not introduce any evidence at the trial below, and appeared at the trial solely through counsel. Appellants have never raised the issue of a forgery, nor denied entering into the loan at issue.

Moreover, there is no error with regard to hearsay or any exceptions thereto, as the Loan Documents should not have been considered hearsay in the first place. Appellants concede, and in fact argue, that "[t]he challenged exhibits in this case are legal instruments, contractual in nature." Appellants' Initial Brief at p. 6. As such, the admitted documents were not offered to prove the truth of the matter asserted but rather are themselves the issue being litigated. See, e.g., Fields v. J. Haynes Waters Builders, Inc., 376 SC 545, 559, 658 S.E.2d 80, 87-88 (2008). That the trial court admitted the documents under the business records exception is, at best, harmless, and certainly not prejudicial to Appellants, as the Loan Documents were admissible as non-hearsay. Respondent can find no legal precedent for Appellants' proposition that, in an action on a contract, the contract is inadmissible due to the rule against hearsay.

III. This Court properly allowed testimony and evidence from Respondent's witness relating to the amount of debt owing.

Respondent is the assignee of the original lender, Community FirstBank, now known as CresCom Bank (the Bank). Respondent, a private investor, purchased the loan from the Bank in a negotiated, arms length transaction. There is no dispute or issue before this Court with regard to the assignment of the Bank's rights under the Loan Documents to Respondent, and Respondent was substituted as Plaintiff in this action without objection from Appellants.

[R. pp. 3-4]. "[I]t is well established that an 'assignee . . . stands in the in the shoes of its assignor . . . . When a contract is assigned, the assignee should have all the same rights and privileges . . . as the assignor." Twelfth RMA Partners, LP, v. National Safe Corporation, 335 S.C. 635, 639-40, 518 S.E.2d 44, 46 (Ct.App. 1999) (citations omitted).

The evidence below clearly shows that the witness Scott Bynum is the sole member of Respondent and the party who reviewed and maintained the business records of Respondent. [R. p. 48, ll. 8-18; p. 63, ll. 3-8]. The evidence further shows that the loan made to Appellants was purchased by Respondent from the loan originator, Community FirstBank, now known as CresCom Bank. [R. p. 46, ll. 17-24; p. 47, ll. 10-12]. Finally, the evidence shows that Respondent reviewed and kept the records prepared by CresCom Bank prior to the purchase of the loan and during pendency of the action on the loan subsequent to the purchase. [R. p. 46, l. 25-p. 47, l. 9; p. 63, ll. 9-12; p. 64, ll. 4-15].

The testimony of Bynum with regard to the amounts outstanding under the loan are clearly within the purview of the business records exception to the hearsay rule. Rule 803(6), SCRE, excludes business records from the hearsay rule:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness . . . .

Id.; see also S.C. Code § 19-5-510. Twelfth RMA Partners is precisely on point. In that

case, the holder of a promissory note and guarantee acquired through assignment from the RTC sued the guarantors. The original lender was closed by the United States Government, which appointed RTC as the receiver. The testifying witness for Twelfth RMA Partners was a portfolio manager for Twelfth RMA. Twelfth RMA, 335 S.C. 635, 639, 518 S.E.2d 44, 45-46. In Twelfth RMA,

> Ms. Every testified that the records about which she testified were part of her file that she maintained in Twelfth's regular course of business.
>
> The Smith argue, however, that she was not the custodian "at or near the time" the records were made. Here, Ms. Every's testimony merely conveyed information from a person "with knowledge" at the time the records were created, a situation expressly allowed under Rule 803(6).

Twelfth RMA Partners at 642, 518 S.E.2d at 48. "Business records of an entity are admissible even though another entity made the records, and the rule does not require an employee if the entity that prepared the record to lay the foundation." Midfirst Bank v. C.W. Haynes & Company, Inc. et al., 893 F.Supp. 1304, 1310 (U.S.D.C., S.C., 1994) (citations omitted) (decision based on the Federal Rules of Evidence). "Moreover, Rule 803(6) does not require the testifying witness to have personally participated in the creation of the document or to know who actually recorded the information." Id. at 1311.

The master properly admitted the business records of Respondent. Furthermore, to the extent that this Court determines that Exhibits 1 through 6 somehow constitute hearsay, it is clear that these documents meet the requirements of Rule 803(6) as well. Appellant provided no testimony and no evidence in the trial below, much less any evidence to dispute, deny, or contradict the testimony and evidence of Respondent. The master committed no

error in admitting the documents and testimony of Respondent, and Appellant cannot meet its burden to show any error committed by the master nor any prejudice resulting therefrom.

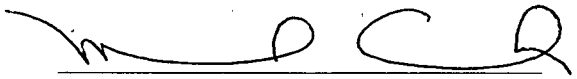
IV. The evidence supports the Master's factual finding with regard to the Guaranties.

It is again unclear whether Appellants preserved the issue now raised with regard to the Guaranties of Terry Rohlfing and Jerry Caldwell. Moreover, the action as to the Guaranties has not yet been heard by a trier of fact, and no judgment has been entered against either Guarantor from which they have standing to appeal. The Appellants' Answer admitted that documents were executed in connection with the loan, that demand had been made on the Guarantors, and that the Guarantors had not made payment. [R. p. 35, ¶¶ 20-21]. The guaranties were exhibits to the Transcript of Testimony proffered to the Master and were part of the Loan documents purchased by and assigned to Respondent. [R. p. 97, ll. 8-13; p. 98, ll. 7-16]. The evidence is sufficient to support the Master's finding of fact with regard to the Guaranties, and should not be disturbed on appeal.

CONCLUSION

The master in equity, sitting as judge and trier of fact below, properly admitted Respondent's Exhibits 1 through 6. Further, the master properly admitted testimony from Respondent's witness with regard to the outstanding principal, receipt of rents pursuant to the Assignment of Leases, Rents and Profits, interest calculations, and costs owed by Appellant Atlantic Private Equity Group, LLC. Furthermore, there was sufficient evidence before the master to support his finding with regard to the guaranties.

For the reasons stated hereinabove, Respondent respectfully requests that this Honorable Court affirm the judgment of the master in equity, award costs to Respondent in its defense of this appeal, and for all other relief this Court deems equitable and proper.



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PROOF OF SERVICE

I certify that I have served the Brief of Respondent and Certificate of Counsel on Appellants, by delivering the same via United States Mail, postage prepaid, on March 31, 2014, to its attorney of record Keating L. Simmons, III, Simons & Dean, 147 Wappoo Creek Drive, Suite 604, Charleston, South Carolina 29412.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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