

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

Branch Banking and Trust
Company,

Respondent,

v.

P. Jason Luquire

Appellant.

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SC Court of Appeals

APPELLANT'S PETITION FOR REHEARING

The Appellant, Jason P. Luquire ("Luquire") hereby petitions this court for a rehearing pursuant to Rules 221(a) and 240 SCACR. This court's opinion (2104-UP-200) was filed on May 21, 2014. Appellant believes the court overlooked or misapprehended the following points:

1. That 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);
2. BB&T included all the guaranteed liabilities in its foreclosure action and resulting judgment against Indigo Limited, LLC.
3. A judgment upon a note merges the note into the judgment, and the judgment becomes the only evidence of the debt. *Schuler v. Israel*, 120 U.S. 506 (1887);
4. The only surviving claim against the principal in the foreclosure action is the deficiency judgment entered against Indigo Limited, LLC which is a non-existent entity;

5. Since there is no valid claim against the principal, there is no existing contract of guaranty.

The court issued a per curiam opinion pursuant to Rule 220(b) SCACR citing both *Citizens & Southern National Bank of South Carolina v. Lanford*, 313 S.C. 540, 543–44, 443 S.E.2d 549, 550–51 (1994) and *Peoples Fed. Savings and Loan Ass'n v. Myrtle Beach Retirement Group, Inc.*, 300 S.C. 277, 387 S.E.2d 672 (1989) as the basis for its decision. As stated by the court, these cases stand for the principles that the note and guaranty are separate contracts and that BB&T does not have to pursue the principal and can pursue the guarantor immediately upon default of the principal. The Appellant does not disagree or argue with these principles; however, this authority does not address or preclude Appellant's arguments on appeal and the points recited above misapprehended by the court.

While the note and guaranty are separate instruments and may be sued upon separately after default, the existence of a contract of guaranty is still dependent on there being someone liable as principal. In this case, there is no principal liability to support the guaranty because the deficiency judgment is not against a valid entity. While BB&T was free to sue Luquire immediately upon default, it chose to foreclose its mortgage and exchange the guaranteed notes for a deficiency judgment against a non-existent principal. The court should be mindful, that BB&T was warned that this was the case.

This legal principle is somewhat analogous to another guaranty case recently decided by this court. In *Coastal States Bank v. Hanover Homes of South Carolina, LLC*, --- S.E.2d ---- 2014 WL 1230237, Appellate Case No. 2012–213154, (S.C. Ct. App. 2014)¹, two individuals formed a company (borrower) which borrowed money from the bank. Each individual signed a guaranty. After default, the bank reached an agreement with the corporate borrower and one of the other individuals who were released. The bank then pursued the remaining guarantor who was not released. The guarantor argued the discharge of the liability of the borrower discharged the guaranty as well. The bank raised some of the same summary arguments and cited the *Lanford*

1. This opinion has not been released for publication in the permanent law reports and until release is subject to revision or withdrawal.

case cited by this court in its opinion about the note and guaranty being separate instruments.

The *Coastal* court noted, "Thus, under *Lanford*, there were few defenses for a guarantor. The law started to change in 2001 with the adoption of the revised Article 9 of the Uniform Commercial Code (UCC), and this change was strengthened and reinforced by the adoption of the revised Articles 3 and 4." *Coastal States Bank* p. 6 The court later cites *Restatement (Third) of Suretyship & Guaranty* § 6 (1996) which provides, "It would seem logical that if the primary obligor is released by the creditor, that discharge of the underlying obligation would also discharge the guarantor. After all, the guarantor is only guarantying the underlying obligation, and if the underlying obligation is no more, there is nothing left to be guaranteed." *Coastal States Bank v. Hanover Homes of South Carolina, LLC*, --- S.E.2d ---- 2014 WL 1230237, Appellate Case No. 2012-213154. p. 7 (S.C. Ct. App. 2014).

While it's true in this case that the principal was not "released", it's equally true that the underlying obligation is "no more" being merged into a deficiency judgment against a non-existent entity. This court should grant this petition for rehearing and address these points which were overlooked or misapprehended by the court with oral argument or at least a full opinion addressing these specific arguments.

Respectfully submitted,

TOBIAS G. WARD, JR., PA



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Dated: 6-4-2014

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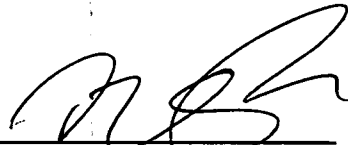
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Appellant.

PROOF OF SERVICE

I certify that I have served a copy of the Appellant's Petition for Rehearing on Branch Banking and Trust Company by depositing a copy of each in the United States Mail, postage prepaid, on June 4, 2014, addressed to his attorney of record, Clay Robinson, Post Office Box 944, Columbia, South Carolina 29202 .



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June 4, 2014

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Branch Banking and Trust Company v P. Jason Luquire
Civil Action No.: 2011-CP-22-01330
Case Tracking No. 2013-000384

Dear Ms. Kitchings:

Enclosed for filing are the original and seven (7) copy of the Appellant's Petition for Rehearing and Proof of Service along with a check for \$25.00 for the filing fee. Please file the original and return a clocked copy in the envelope provided.

Along with a copy of this correspondence we are serving a copy of the Record on Counsel for the Respondent.

Respectfully,

TOBIAS G. WARD, JR., PA



J. Derrick Jackson

Enclosures

TGW,Jr.:wrc

cc: P. Jason Luquire (w /o enclosures)
Clay Robinson, Esquire(w / enclosures)

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