ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III
Beaufort County
Trial Court Case No. 2011-CP-07-1933

RECEIVED
JUL 07 2014
SC Court of Appeals

Case No. 2013-002281

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.

AMENDED REPLY BRIEF OF APPELLANTS

Keating L. Simons, III
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
843-762-9132
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ARGUMENT

I. THE COURT ERRED IN ADMITTING INTO EVIDENCE THE NOTE AND OTHER LOAN DOCUMENTS UNDER THE BUSINESS RECORDS EXCEPTION TO THE RULE AGAINST HEARSAY.

Respondent first takes issue with Appellants' framing the issue as one of hearsay and commingling issues of authentication with that of hearsay. [Resp. Br. at 3] Respondent then asserts, for the first time, that the challenged exhibits were not hearsay at all. [Resp. Br. at 5] This argument overlooks what happened at the hearing. Appellants objected that the witness lacked personal knowledge of the execution of the documents, could not establish a foundation for their admission into evidence, was not competent to testify about them, and to the extent he were to do so, that would constitute hearsay. [R. p. 49, lines 16-21; R. p. 50, line 22 - p. 52, line 20; R. p. 54, lines 12 - 18; R. p. 65, lines 12-13; and R. p. 77, lines 8-19] [1]

Respondent did not dispute the hearsay nature of the offered testimony. Rather, both the court and Respondent's counsel addressed the issue as one of the rule against hearsay and the possible application of the business records exception thereto. Judge Dukes questioned whether Respondent could establish that the challenged exhibits were "part of the ordinary business records" of Respondent [R. p. 54, lines 19 - 23] and Respondent elicited testimony in an attempt to make that showing. [R. p. 63, lines 3-8] And in the order under appeal the court specifically relied upon the business records exception as the basis on which the challenged exhibits had been admitted into evidence. [R. p. 17, ¶ 26] Under these circumstances Respondent should not be

---

[1] Appellants reject Respondent's assertion that they failed to preserve their objections by consenting to the substitution of copies for originals. [Resp. Br. at 3, fn. 2] The transcript is clear that Appellants consented to substitution, not admission into evidence, as to which Appellants repeatedly and consistently objected.

heard to complain that Appellants have challenged the erroneous ruling actually made by the trial court, rather than a ruling Respondent now says the court should have made but was never asked to make below.

In this Court, for the first time, Respondent argues that the documents were "self-authenticating" under Rule 902(9), SCRE and §36-3-308, S.C. Code Ann. (1976), because execution of the documents was not specifically denied by Appellants. [Resp. Br. at 3-5] However, in their answer to the complaint Appellants specifically did not admit the execution of the alleged loan documents, admitting "only" that a loan, not the particular loan alleged, was made. [R. p. 34, Answer, ¶ 9] At the hearing counsel for Appellants informed the court that Appellants had denied requests for admissions that they had signed the documents, and that Appellants had never admitted the execution of the documents. [R. p. 52, lines 2 - 10] Respondent was, or should have been, on notice that the authenticity, including the signatures, of the documents was disputed.

Respondent cites *National Equipment, Ltd. v. David Jones Sales, Trucking Division, Inc.*, 268 S.C. 551, 235 S.E.2d 125 (1977) in support of its position in this Court. However, as noted in that case, the purpose of the rule applied there is "to give the plaintiff notice that he must meet a claim of forgery or lack of authority as to the particular signature, and to afford him an opportunity to investigate and obtain evidence." 268 S.C. at 554, 235 S.E.2d at 126.

Respondent complains that the individual Appellants did not appear at trial. However,

Respondent could have served a subpoena to compel their attendance but did not do so. Likewise, having been served with Appellants' denials in their answer and discovery responses, Respondent could have taken their depositions or sought to obtain testimony from others with knowledge of the execution and delivery of the disputed documents. Simply stated, Respondent was on notice but failed to take advantage of the "opportunity to investigate and obtain evidence" noted by the court in *National Equipment, Ltd.* The burden-shifting rule of that case should not apply here.

II. THE COURT ERRED IN ADMITTING INTO EVIDENCE HEARSAY TESTIMONY OFFERED TO PROVE THE AMOUNT OF THE PRINCIPAL BALANCE ALLEGEDLY DUE UNDER THE NOTE.

In responding to Appellants' brief on this point Respondent includes an argument heading to the effect that the court properly allowed testimony from the witness "relating to the amount of the debt owing." [Resp. Br. at 5] However, in this portion of its brief Respondent argues only that the challenged exhibits were business records properly admitted under the corresponding exception to the rule against hearsay. Respondent does not address the fact that none of the challenged exhibits, even if properly admitted, includes evidence concerning the amount due under the alleged loan at the time it was purchased by Respondent.

In the order under appeal the court found that the principal due on the loan was in the amount of $1,532,238.05. [R. p. 18, ¶ 28(a)] This number is not to be found in any of the documentary materials entered into evidence. Rather, the witness was permitted, over Appellants' objections [R. p. 80, lines 3-19; R. p. 82, lines 14 -18], to answer counsel's question: "According to your records what is the principal balance, not the interest or costs, but the

principal balances [sic] due and owing at the present time?" [R. p. 82, lines 10-23]

According to the note and mortgage entered into evidence over Appellants' objections the initial principal balance on the loan amounted to $2,000,000.00 and it was secured by two properties. [R. p. 117, 124] Thus, by the time Respondent acquired the loan the principal had been substantially reduced. According to Respondent's evidence, the reduction was due to payments received by the bank, rents received from tenants, and proceeds from the sale of one of the two properties securing the loan. [R. p. 89, lines 18 - 24; R. p. 82, lines 2-9; and R. p. 81, lines 15-23] No accounting was offered of any of the payments or other credits resulting from these transactions, all of which occurred prior to Respondent's purchase of the loan. The testimony of the witness that X dollars were owed on the loan net of all appropriate credits is functionally no different from the summaries disallowed in *South Carolina National Bank v. Jones*, 302 S.C. 154, 394 S.E.2d 323 (1990).

The witness testified that he had seen bank records showing a principal balance due, but no such records were identified, described or produced. The record in this case does not establish that whatever documents the witness was shown by the bank were prepared at or about the times of the transactions involved, as required by *South Carolina National Bank v. Jones*, 302 S.C. 154, 394 S.E.2d 323 (1990), or that they were prepared by someone with knowledge of those transactions, as required by *Twelfth RMA Partners, L.P. v Nat'l Safe Corp.*, 335 S.C. 635, 518 S.E. 2d 44 (Ct. App. 1999). There is nothing in the record to show that whatever records the witness reviewed were "honestly and fairly kept" to accurately reflect all payments and other credits on the loan. *South Carolina National Bank v. Jones*, 302 S.C. 154, 155, 394 S.E.2d 323, 324 (1990).

The prejudice to Appellants is obvious: without the inadmissible hearsay testimony of Respondent's witness concerning the unpaid principal balance there is no case. *See South Carolina National Bank v. Jones*, 302 S.C. 154, 394 S.E.2d 323 (1990)(judgment for creditor reversed where based upon inadmissible evidence concerning the amount owed). The business records exception to the rule against hearsay cannot fill this evidentiary hole in Respondent's case.

III. THE COURT'S FINDING THAT THE INDIVIDUAL APPELLANTS HAD EXECUTED AND DELIVERED PERSONAL GUARANTIES MUST BE VACATED BECAUSE THIS ISSUE WAS OUTSIDE THE SCOPE OF THE ORDER OF REFERENCE AND THERE WAS NO EVIDENCE IN THE RECORD TO SUPPORT SUCH A FINDING

Respondent asserts that the guaranties were exhibits to a transcript of testimony prepared by Respondent prior to the hearing. [Resp. Br. at 8] However, neither the transcript nor the alleged guaranties were entered into evidence, nor are they included in the record on appeal. Respondent acknowledges the individuals' rights to an action before a trier of fact, an action that "has not yet been heard." [Id.] Nevertheless, Respondent asserts that this Court should affirm the factual findings in the order under appeal that the individual Appellants had executed and delivered personal guaranties of the very loan in dispute. Should this occur then the "rights" of the alleged guarantors to a jury trial would be of no practical value.

Appellants timely noticed their appeal from Judge Dukes' amended order, but did not seek to prevent the foreclosure sale. The property has been sold and all that remains for decision is whether Appellants are liable for a deficiency. If this Court affirms the judgment below with respect to the existence and amount of the debt, the amount of the deficiency will have been established. And if this Court affirms the factual findings concerning the execution and delivery

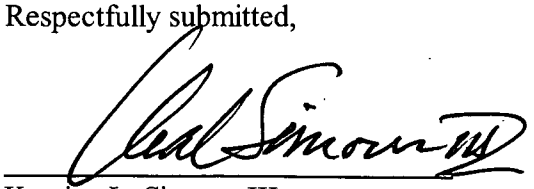
of personal guaranties by Appellants Caldwell and Rohlfing, then these individuals could be bound by the law of the case, with nothing left for decision by a jury as provided for in the order of reference. [R. p. 6]

On the other hand, if this Court reverses the judgment, the foreclosure sale will not be undone, Respondent will own the property it purchased at the sale and the parties will be where they should be. Respondent will retain the opportunity, and the burden, to prove the terms of the loan, the amounts actually due thereunder, and the liability, if any, of the alleged guarantors. Respondent is not prejudiced in any way by this outcome; its claims against the individual Appellants were at all times to be subject to proper proof before a jury. In contrast, the prejudice to Appellants caused by the judgment below and the evidentiary errors on which it was based would be complete and final should the judgment be affirmed.

CONCLUSION

The challenged exhibits were inadmissible under any theory. They were not admissible as business records, nor were they "self-authenticating" in light of the notice to Respondent that their execution and authenticity were disputed by Appellants. Without the challenged exhibits, there is no evidence of the terms of the loan on which suit was brought and the judgment should be reversed on that ground. Alternatively, even if this Court finds that the loan documents were properly admitted into evidence, there was no competent, admissible evidence as to the amount due. This finding should be vacated and the judgment reversed on that ground.

Respectfully submitted,



Keating L. Simons, III
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
(843) 762-9132

ATTORNEYS FOR APPELLANTS

June 30, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III
Beaufort County
Trial Court Case No. 2011CP0701933

Case No. 2013-002281

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.

PROOF OF SERVICE

I, Debra Y. Coffey, a paralegal with the Law Offices of Simons & Dean, do hereby certify that I have served counsel in this action with a copy of the foregoing Amended Reply Brief of Appellants upon the below named by mailing a copy of same via U.S. Mail, postage prepaid, and properly addressed as follows:

Meredith Coker, Esquire
Altman & Coker, LLC
575 King Street, Suite A
Charleston, South Carolina 29403
Attorneys for Respondent

This 3rd day of July, 2014.

LAW OFFICES OF SIMONS & DEAN

BY: _____
Debra Y. Coffey, Paralegal