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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

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 BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

STATEMENT OF ISSUES ON APPEAL

I. Whether the court erred in admitting into evidence the note and other loan documents under the business records exception to the rule against hearsay.

II. Whether the court erred in admitting into evidence hearsay testimony concerning the principal balance allegedly due under the note.

III. Whether the court's finding that guaranties had been given should be vacated because the guaranty claims were outside the scope of the order of reference and without evidentiary support inasmuch as the alleged guaranties were not in evidence.

STATEMENT OF THE CASE

This is an action commenced by Community First Bank on April 25, 2011. Two causes of action were stated, the first to foreclose a mortgage on two parcels of real estate in Beaufort County owned by Appellant Atlantic Private Equity Group, LLC, and the second for judgments against two alleged guarantors, Appellants Terry L. Rohlfing and Jerry T. Caldwell. A deficiency judgment was sought against all Appellants.

Appellants timely filed an answer by which, generally stated, they admitted that a loan was made, that it was secured by a mortgage and that it had not been repaid by the mortgagor or the alleged guarantors. Appellants did not admit the specific loan documents alleged and specifically denied the amount claimed to be due under the note.

In July of 2011, Community First Bank merged into CresCom Bank. There was no substitution of parties at that time.

In August of 2012, one of the two parcels was sold and released from the mortgage. The action continued as to the remaining parcel.

In September of 2012, CresCom Bank assigned the loan to Respondent Deep Keel, LLC.

On April 17, 2013, the circuit court entered an order referring the case to the master-in-equity

for the purpose of adjudicating the mortgage foreclosure action. The order further provided that "upon a resolution or disposition of the foreclosure action, this case is to be returned to the Circuit Court for final hearing and disposition as to any issues triable by jury as against Defendants Terry L. Rohlfing and Jerry T. Caldwell."

On April 17, 2013, the circuit court also entered an order substituting Respondent Deep Keel, LLC for Community First Bank as plaintiff in the action.

A non-jury foreclosure hearing was held on July 10, 2013, before The Honorable Marvin H. Dukes, III. Appellants appeared through counsel, but Messrs. Rohlfing and Caldwell were not in attendance. No one appeared as a witness to establish the execution of the note, mortgage and other loan documents by the Appellants. Instead, Deep Keel, LLC offered into evidence the alleged loan documents through its sole member, Scott Bynum. Appellants Atlantic Private Equity Group, LLC, Terry L. Rohlfing, and Jerry T. Caldwell objected to this on the grounds that the witness lacked personal knowledge sufficient to lay a proper foundation and was seeking to introduce inadmissible hearsay. The court overruled the objections and allowed the introduction of the documents.

Deep Keel, LLC also sought to establish the amount due on the loan through Mr. Bynum based on information the witness said he received from CresCom Bank at the time of the assignment of the loan. Appellants again objected on hearsay grounds, and the court again overruled the objection.

On July 29, 2013, the court entered its Master's Report and Judgment of Foreclosure and Sale (Deficiency Demanded). Appellants received written notice of the entry of this order on August 5, 2013 and filed a Motion to Reconsider on August 13, 2013. In the motion, Appellants pointed out that the order erroneously recited the court's having received written testimony and indicated "there

were no objections." Appellants repeated the evidentiary objections made at the hearing and moved that various factual findings enumerated in the motion, and any conclusions of law based thereon, be altered, amended, and vacated as without evidentiary support.

On September 5, 2013, the court entered its Amended Master's Report and Judgment of Foreclosure and Sale (Deficiency Demanded). This order included an additional paragraph addressing, though incompletely, Appellants' objections and stating the court's ruling with respect thereto. [R. p. 17, ¶ 26]

Written notice of the entry of the amended order was received by Appellants' counsel on September 13, 2013. Notice of the within appeal was timely served on October 10, 2013.

The initial foreclosure auction was conducted on September 3, 2013. The high bid was made by Deep Keel, LLC in the amount of $900,000.00. The second auction was held on October 3, 2013. There being no other bidders the sale to Deep Keel, LLC became final. The court having found the debt to amount to $1,655,026.52, the amount involved in the appeal is $755,026.52 plus interest.

STATEMENT OF FACTS

Central to the disposition of this appeal is the question of whether the court erred in admitting into evidence testimony and documents offered by Deep Keel, LLC to prove the loan terms and amounts allegedly due. In particular, over Appellants' objections the court admitted into evidence the following:

Exhibit 1: Promissory Note

Exhibit 2: Mortgage

Exhibit 3: Assignment of Leases, Rents and Profits

Exhibit 4: Loan Modification Agreement

Exhibit 5: Loan Modification Agreement

Exhibit 6: Partial Release of Mortgage and Assignment of Leases, Rents and Profits

[R. p. 50, line 22 - p. 52, line 20; R. p. 54, lines 12 -18; R. p. 62, lines 1 - 24; R. p. 65, lines 5 - 14; R. p. 68, line 14 - p. 70, line 11; R. p. 71, line 9 - p. 75, line 16; R. p. 76, line 10 - p. 77, line 20]

Each of the challenged exhibits was purportedly executed on behalf of the Appellant Atlantic Private Equity Group, LLC by Terry L. Rohlfing as president of New Colony Holdings Corporation, manager of Atlantic Private Equity Group. [R. pp. 113, 122, 128, 132, and 134] The only evidence offered by Respondent Deep Keel, LLC to authenticate these exhibits and offer a proper foundation for their admission into evidence consisted of the testimony of Scott Bynum.

Mr. Bynum is a New York resident and the sole member of Deep Keel, LLC. [R. p. 46, line 16; R. p. 48, line 10] He does not know Mr. Rohlfing or Mr. Caldwell. [R. p. 71, lines 20 - 23] He is not familiar with Mr. Rohlfing's signature and admits he has no knowledge of whether Mr. Rohlfing signed the documents or any personal knowledge of how these exhibits came to be in existence. [R. p. 71, line 24 - p. 72, line 14] He has never been employed by Community First Bank or CresCom Bank and has no knowledge of how these exhibits may have been maintained by the banks. [R. p. 71, lines 9 - 15; R. p. 72, lines 15 - 18] He first saw copies of the exhibits in New York in September of 2012 and was sent originals after his purchase of the loan. [R. p. 69, lines 16 - 25] He acknowledged that all he personally knows is that he paid money to the bank and they gave him some documents, and that as far as he is concerned all of the information about the loans he provided was second or third hand information. [R. p. 72, lines 19 - 23; R. p. 75, lines 2 - 7]

Similarly, and again over Appellants' objections, Mr. Bynum was permitted to testify

concerning amounts allegedly due on the loan. [R. p. 79, line 20 - p. 80, line 19; R. p. 82, lines 10 - 21] He admitted having no knowledge of the amount actually owed on the loan at the time he purchased it. [R. p. 89, lines 10 - 13] And he admitted that his testimony concerning the unpaid principal balance was based entirely on a number given to him by the bank, a number of which he had no knowledge and no way to verify. [R. p. 90, lines 5 - 16] He did claim that he had reviewed bank payment and balance records, but the records themselves were not brought to court or offered into evidence. [R. p. 89, line 14 - p. 90, line 4]

At the hearing, Deep Keel did not dispute that the challenged exhibits and testimony constituted hearsay. Rather, Respondent and the court considered whether the exhibits could be admitted under the business records exception. In that regard, Mr. Bynum responded affirmatively to his counsel's question, "... subsequent to your – the Assignment of the loan from the bank to Deep Keel, have you maintained the records regarding the loan in the ordinary course of the business of Deep Keel." [R. p. 63, lines 3 - 8] He went on to say that he had reviewed the records prior to purchasing the loan and had found nothing out of the ordinary. [R. p. 64, line 4 - p. 65, line 4] On cross-examination on this point the witness acknowledged that Deep Keep maintained a checkbook and accounting records, that he regularly maintained those records, and that they constituted regularly maintained business records of Deep Keel. [R. p. 73, line 13 - p. 74, line 11]

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.

Appellants objected to the introduction of Exhibits 1 through 6 (collectively the "loan documents") on the grounds that they constituted hearsay and that no proper foundation was

established for their admission. The court overruled Appellants' objections, finding that "Mr. Bynum was entitled to testify regarding the information contained in the records he received from the Bank pursuant to SC Code § 19-5-510 and Rule 803(6) SCRCP [sic] and pursuant to the ruling regarding [sic] of the South Carolina Court of Appeals in the case of *Twelfth RMA Partners, L.P. v Nat'l Safe Corp.*, 335 S.C. 635, 518 S.E. 2d 44 (Ct. App. 1999)." [R. p. 17, ¶ 26] The court erred in this ruling.

The loan documents involved in this case are not "records" within the meaning of the statute or the rule cited by the court. The Uniform Business Record as Evidence Act speaks to a "record of an act, condition or event." §19-5-510, S.C. Code Ann. (1976) (hereinafter the "Act"). Similarly, Rule 803(6), SCRE, applies to a "memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses." (hereinafter the "Rule"). The challenged exhibits in this case are legal instruments, contractual in nature. They are not records or reports of an act, condition, event, or diagnosis. Nor are they records of regularly conducted activity on the part of Deep Keel.

Other requirements for admission into evidence of the loan documents as business records were not met. The business records exception does not absolve the offering party from the usual requirements of authentication. *State v. Rich*, 293 S.C. 172, 173, 359 S.E.2d 281, 281 (1987). A business record without evidence about the manner in which it is prepared or the source of its information does not meet the requirements of the Act or the Rule. *State v. Rice*, 375 S.C. 302, 331, 652 S.E.2d 409, 424 (Ct. App. 2007). The offering party must show that the records were made at or near the time of the transactions to which they relate. *South Carolina National Bank v. Jones*, 302 S.C. 154, 155, 394 S.E.2d 323, 324 (1990). And the records must be shown to have been made by a person "with knowledge" of the events at the time the records were made. *Twelfth RMA Partners, L.P. v. National Safe Corporation*, 335 S.C. 635, 642, 518 S.E.2d 44, 48 (Ct. App. 1999).

In this case the witness through whom the "business records" were offered had no knowledge of when, how or by whom the documents were prepared, how they came to be in the possession of CresCom Bank, or how they were maintained by that bank. All he could testify to of his own knowledge was that he had paid money to CresCom Bank and had been sent the documents, which he thereafter "maintained" as part of the records of his business at Deep Keel. Mr. Bynum's mere receipt and retention of the documents does not qualify him to establish the predicates for their admission into evidence as business records. *State v McFarlane*, 279 S.C. 327, 306 S.E.2d 611 (1983) (detective not competent to authenticate as a business record medical report requested and received from out-of-state doctor).

In their answer, and again in response to requests for admissions, Appellants denied the authenticity of the particular alleged loan documents on which Deep Keel relied for its claims. [R. p. 33; R. p. 52, lines 2 - 10] Thus, the authentication, including identification and execution of particular documents setting forth the terms of the loan were placed in issue for trial. *See* 12 Am. Jur. 2d *Bills and Notes* § 598 (if validity of signature is denied the burden of establishing validity is on party claiming under the signature); *Compare Iowa City State Bank v. Hoefer*, 101 S.C. 207, 85 S.E. 406 (1915) (where defendant admits giving the note, not error to admit note into evidence without proof of execution by defendant).

Rule 71(a), SCRCP, provides that "[i]n all cases proof shall be made of the facts and circumstances alleged in the pleadings and evidence given as to any payments which have been made or credits due." Witnesses offered by plaintiffs in foreclosure cases "shall be subject to the same examination, cross-examination and reply and the same exceptions as to the admissibility of testimony may be taken as are allowed by law upon examination before the court." §14-11-110, S.C.

Code Ann. (1976). Accordingly, Appellants were entitled to require that Plaintiff prove at trial, by competent, admissible evidence, the allegations set forth in the complaint. Plaintiff did not meet its burden in this regard.

Based strictly on the challenged exhibits, the court made a number of factual findings on which its judgment was based, including that: Appellant Atlantic Private Equity Group, LLC executed and delivered the note, mortgage, assignment of rents, commercial security agreement, and loan modification agreements (R. p. 15, Findings 15, 16, 19, 20, 21 and 22); that Appellants Rolhfing and Caldwell executed and delivered personal guaranties (R. p. 15, Finding 18); and, that payment was due on the note as modified (R. p. 17, Finding 25). These findings are without proper evidentiary support and should be vacated and the judgments based thereon against Appellants should be reversed. Finding 18, relating to personal guaranties allegedly executed by Messrs. Rohlfing and Caldwell, must be vacated on the further ground that the alleged guaranty documents were not in evidence, and there was no competent evidence to prove their existence or terms. This issue is also briefly addressed below.

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 the Amended Master's Report and Judgment of Foreclosure and Sale (Deficiency Demanded), the court also made a factual finding concerning the amounts due under the note, Finding 28. [R. p. 18] Again, the only evidence in the record on this point consisted of the testimony of Scott Bynum. Over Appellants' objections the witness was permitted to testify to the unpaid principal balance based upon his review of bank records. (R. p. 79, line 20 - p. 82, line 46) He admitted, however, that he did not bring with him any of the alleged bank records on

which he claimed to rely, that his calculation of the amounts due was based upon a principal balance number given to him by the bank, that he had no knowledge of what was actually owed, and no way to verify the number given him by the bank. (R. p. 88, line 15 - p. 90, line 16)

Mr. Bynum's testimony constituted hearsay, to which no exception applies. Deep Keel did not bring to the hearing, much less offer into evidence, any payment records to establish the principal amount due under the loan. The business records exception of neither the Act or the Rule should apply in a case where no records are actually offered into evidence. However, even if it were deemed appropriate in some circumstances for a witness to testify about the contents of business records without producing or offering the records themselves, no such circumstances exist in this case. There is nothing in the record to identify the records from which he supposedly testified or to show how they were prepared, *State v. Rice*, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007), or that they were prepared at the time payments were made, *South Carolina National Bank v. Jones*, 302 S.C. 154, 394 S.E.2d 323 (1990), as opposed to, for example, having been prepared by the bank for use in negotiating with Deep Keel over the price to be paid for the loan.

The master's reliance on *Twelfth RMA Partners, L.P. v Nat'l Safe Corp.*, 335 S.C. 635, 518 S.E. 2d 44 (Ct. App. 1999), [R. p. 17, ¶ 26] is misplaced. The case actually supports Appellants' position. In that case this Court held that a witness in a position similar to that of Deep Keel's witness here could testify from records where it was shown that the information being relayed was from a person "with knowledge" of the transactions at issue. No such showing has been made here. The record does not reveal from whom or from what records Bynum obtained his information, much less that the individuals who gave him the information or the individuals who prepared the records he reviewed were persons "with knowledge."

Stripped to its essentials, what happened here was that Deep Keel came to court prepared to testify that the unpaid principal balance owed on the note was a number, a number given to him by the bank. That is functionally no different than a bank seeking to prove its case through summary statements, an approach specifically disallowed in *South Carolina National Bank v. Jones*, 302 S.C. 154, 394 S.E.2d 323 (1990). There the bank introduced summary statements without including the monthly statements from which the summaries were compiled. The supreme court reversed, finding that the summaries should not have been introduced in absence of evidence that they were prepared at or near the time of the transactions. Here the record does not reveal what bank records the witness reviewed. We do not know whether the records were made at or near the times of the underlying transactions or whether they were themselves inadmissible summaries. Even if the bank showed Bynum contemporaneous billing and payment records, his verbal summary of the results of his review is not admissible.

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.

The order referring the case to the master provides that "upon a resolution or disposition of the foreclosure action, this case is to be returned to the Circuit Court for final hearing and disposition as to any issues triable by jury as against Defendants Terry L. Rohlfing, and Jerry T. Caldwell." [R. p. 6] When the hearing began the court stated, "This is a deficiency action. There is also a claim for guarantee that would be heard in a separate action." [R. p. 41, lines 2 - 5] This was discussed by the court and counsel, and as a result the alleged guaranties, which had been included in the written submission package prepared by counsel for Deep Keel, were not

introduced into evidence. [R. p. 59, lines 4 - 7; R. p. 61, lines 14 - 15; R. p. 62, lines 2 - 22] The final order entered by the court nevertheless included Finding 18 relating to the execution and delivery of personal guaranties by Messrs. Rohlfing and Caldwell. [R. p. 15] Out of an abundance of caution, to prevent a later claim of waiver or law of the case, Appellants submit that this finding should be vacated inasmuch as it was outside the scope of the order of reference as acknowledged by the court and counsel, and because there was no evidence admitted in support of it.

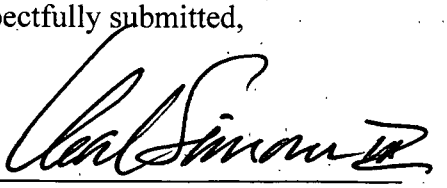
CONCLUSION

The only evidence before the court concerning proof of the loan and its terms consisted of the improperly admitted loan documents and testimony based thereon. This Court should hold that there was no competent evidence in support of Findings of Fact 15, 16, 17, 18, 19, 20, 21, 22, and 25, and reverse the judgments entered against Appellants.

Further, the only evidence as to the principal balance allegedly due under the loan consisted of improperly admitted hearsay testimony. This Court should hold that there was no competent evidence in support of Finding of Fact 28, and reverse the judgments entered against Appellants.

Finally, Finding of Fact 18, relating to personal guaranties allegedly given by Appellants Rohlfing and Caldwell, was outside the scope of the order of reference and there was no evidence admitted in support of this finding. This Court should vacate this finding so that this issue is reserved for resolution by a jury as provided for in the order of reference.

Respectfully submitted,



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June 30, 2014

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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 Brief of Appellants upon the below named by mailing a copy of same via U.S. Mail, postage prepaid, and properly addressed as follows:

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This 3rd day of July, 2014.

LAW OFFICES OF SIMONS & DEAN

BY: Debra Y. Coffey

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