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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

JMT Capitol Holdings, LLC,

Case No. 2014-CP-07-0380

Plaintiff,

vs.

VDM/T Land Company, LLC and  
Daufuskie Island Properties, LLC,

Defendants.

**ORDER GRANTING THIRD-PARTY  
DEFENDANT RAYMOND  
TRAVAGLIONE'S MOTION TO  
DISMISS THIRD-PARTY COMPLAINT**

Daufuskie Island Properties, LLC and its  
successor in interest, Ace Basin Investments,  
LLC,

Third-Party Plaintiff,

vs.

Raymond Travaglione,

Third-Party Defendant.

2014 SEP 25 11:58

This matter is before the Court on the motion of third-party defendant Raymond Travaglione ("Travaglione") to dismiss the third-party complaint filed by defendant and third-party plaintiff Daufuskie Island Properties, LLC ("Daufuskie") on April 16, 2014 (the "Third-Party Complaint"). Based on the arguments of counsel and pleadings properly before the Court, and for the reasons set forth below, Travaglione's Motion is granted.

**PROCEDURAL HISTORY**

Travaglione's Motion was filed on July 8, 2014. A hearing was scheduled for August 11, 2014. Prior to the hearing, Daufuskie filed a memorandum in opposition to the Motion, and Travaglione filed a memorandum in support of the Motion. At the conclusion of the hearing, the Motion was taken under advisement, and a telephonic status conference was scheduled for

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September 5, 2014. On September 4, 2014, one day prior to the telephonic hearing, counsel for Daufuskie submitted a supplemental memorandum, in the form of a letter, to the court. Counsel for Travaglione submitted a response, also in the form of a letter, on the morning of September 5, 2014. On September 5, 2014, the Court conducted a status conference, and heard further arguments of counsel, and again took the matter under advisement.

### STANDARD OF LAW

South Carolina Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint due to its "failure to state facts sufficient to constitute a cause of action." "The question is whether, in the light most favorable to the [claimant], and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Plyler*, 373 S.C. at 645, 647 S.E.2d at 192 (citing *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987)).

When deciding a motion to dismiss under Rule 12(b)(6), SCRPC, the court should only consider the allegations set forth in the pleadings. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007) (citing *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)). If, in the court's consideration of a motion to dismiss, "matters outside the pleadings are presented to and not excluded by the court, 'the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 [of the South Carolina Rules of Civil Procedure].'" *Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 574, 593 S.E.2d 624, 627 (Ct. App. 2004) (quoting S.C. R. Civ. P. 12(b)).

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### 1. Procedural Background

JMT Capitol Holdings, LLC ("Plaintiff") commenced this action on February 19, 2014, seeking to foreclose its mortgage against VDM/T Land Company, LLC ("

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VDM/T"), waiving any deficiency claim against its borrower, VDM/T.<sup>1</sup> In addition, Plaintiff sought a declaratory judgment that its lien was a valid and enforceable first mortgage lien against the Properties. Daufuskie was named as a defendant in this action by virtue of its status as a lienholder on the Properties.<sup>2</sup> In response to the foreclosure complaint, Daufuskie filed an Answer and Third-Party Complaint on April 16, 2014 (the "Third-Party Complaint"), wherein it denied that Plaintiff held the first mortgage lien against the Properties and that Plaintiff is entitled to foreclosure of its mortgage. Daufuskie also brought a third-party complaint against Mr. Travaglione for alleged breach of his Guaranty of the Daufuskie Notes (hereinafter defined).

## 2. Facts Relative to Travaglione Motion

The following facts appear within Plaintiff's Complaint and Daufuskie's Third Party Complaint and the exhibits attached thereto:

On or about June 2, 2006, pursuant to Partial Release and Subordination Agreements, VDM/T executed and delivered to Daufuskie two promissory notes in the amount of \$400,000.00 and \$100,000.00 each (collectively, the "Daufuskie Notes"). To secure the Daufuskie Notes, VDM/T executed and delivered to Daufuskie a mortgage on each of the Properties (the "Daufuskie Mortgages"). As additional security for the Daufuskie Notes, Travaglione executed and delivered to Daufuskie a guaranty (the "Guaranty").

The Guaranty is, by its terms, a guaranty of payment. Above the signature line, the Guaranty states, "IN WITNESS WHEREOF, this instrument has been duly executed by the undersigned this 2 day of June, 2006." Directly below this language is language which states,

<sup>1</sup> On or about June 2, 2006, VDM/T executed and delivered to First Federal Savings & Loan Association of Charleston ("Bank") a promissory note and a mortgage, pursuant to which VDM/T granted Bank a mortgage on certain parcels of real property located in Beaufort County (the "Properties"). Bank's note and mortgage were later sold and assigned to VFC Partners 15, LLC ("VFC"), who later assigned the note and mortgage to Plaintiff.

<sup>2</sup> On or about June 2, 2006, Daufuskie and Travaglione, along with additional parties, entered into Partial Release and Subordination Agreements, which provided that Daufuskie would provide the purchaser of the Properties with purchase money financing, to be secured by mortgages on the Properties, and would agree to subordinate the debts to any construction financing obtained to erect improvements on the Properties.

"SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF:". The Guaranty is signed by two witnesses, and by Raymond M. Travaglione as Guarantor.

**3. Travaglione Motion to Dismiss Third-Party Complaint.**

- a. The Guaranty is not a sealed instrument and therefore, S.C. Code § 15-3-530, not S.C. Code § 15-3-520(b), is the applicable statute of limitations.

Travaglione sought to have the Third-Party Complaint dismissed on the following grounds:

a) The Third-Party Complaint is not a proper third-party complaint under South Carolina Rule of Civil Procedure 14 because Daufuskie's claims against Travaglione are not derivative of any liability Daufuskie has to Plaintiff in the foreclosure action.

b) Daufuskie is judicially estopped from asserting its claim on the Guaranty because it failed to list the claim in its chapter 11 bankruptcy case.

c) Daufuskie's claim on the Guaranty is barred by the applicable statute of limitations.

Assuming, without deciding, that the third-party complaint was procedurally proper, and that judicial estoppel considerations did not apply, Travaglione also asserts that this action is barred by the statute of limitations because it was brought more than three (3) years after default on the Guaranty.

Travaglione argues that the applicable statute of limitations for a suit on this guaranty is three years. Specifically, S.C. Code § 15-3-530 provides that "within three years . . . an action upon a contract, obligation, or liability, express or implied [must be commenced]." Daufuskie disagrees, arguing that because the Guaranty is a sealed instrument, the limitations period is twenty years. *See* S.C. Code § 15-3-520(b).

Based on the record before it and the applicable law, the Court finds that the Guaranty is not a sealed instrument, and that the three year statute of limitations set forth in S.C. Code § 15-3-530 applies to the Guaranty.

In *Treadaway v. Smith*, 325 S.C. 367, 479 S.E.2d 849 (Ct. App. 1996), the court of appeals considered the issue of whether or not a guaranty was a sealed instrument. In *Treadaway*, in addition to "SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF" language, the document at issue also contained the language "IN WITNESS WHEREOF, the parties have hereunto set their respective Hands and Seals in quadruplicate as of the day and year first above written" above the parties' signatures. In another court of appeals case considering the same issue, *South Carolina Dept. of Social Services v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 320 S.E.2d 464 (Ct. App. 1984), the court found that the document was a sealed instrument because the following indicia of the parties' intent to create a sealed document were present:

- a) The attestation clauses stated that "the parties hereto have set their hands and seals";
- and
- b) The signatures of the parties were followed by the notation "L.S."

*Winyah Nursing Homes*, 282 S.C. at 561, 320 S.E.2d at 467.

Unlike the *Treadaway* and *Winyah Nursing Homes* documents, the Guaranty in this case is more comparable to the guaranty agreement in *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005), which contained only the language "IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this \_\_\_ day of December, 1996," without more. The court of appeals held this was insufficient to establish the parties' intent to create a sealed instrument. *Carolina Marine*, 363 S.C. at 172, 609 S.E.2d at 550; see also *Clifton, LLC v. Tadlock*, 2012 WL 909826, *aff'd*, 513 Fed. Appx. 255 (4th Cir. 2013)

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("[B]ecause the Lease in our case contains only the clause "Signed, sealed and delivered," and no other indicia sufficient to evidence an intent to seal, the undersigned finds that the parties did not intend for the Lease to be sealed."). Considered together, *Treadaway*, *Winyah Nursing Homes*, and *Carolina Marine Handling* make clear that before a document can be found to be a sealed instrument, more evidence of the parties' intent to create such a document is necessary than is present in this case.

The Guaranty before the Court, like the guaranty in *Carolina Marine*, does not reflect an intent by the parties to create a sealed instrument. The only reference to a "seal" in the Guaranty appears directly above the parties' and the witnesses' signatures. See supra, at pg. 3. There is no "L.S." or other notation after any of the signatures to the Guaranty. Further, the body of the Guaranty is devoid of language that would indicate the parties' intent to create a sealed instrument. Based on the foregoing, the Court finds that the Guaranty is not a sealed instrument. As a result, the applicable statute of limitations is three years.

**b. The Applicable Three-Year Statute of Limitations has expired, and the Third-Party Complaint is time barred.**

The South Carolina Court of Appeals has found that the statute of limitations for an action on a guaranty begins to run upon default of the obligor. *CoastalStates Bank v. Hanover Homes of South Carolina, LLC*, 759 S.E.2d 152 (S.C. Ct. App. 2014). The bankruptcy schedules in Daufuskie's chapter 11 bankruptcy case, filed in January 2009 and amended in March 2009, indicate that at the time of its bankruptcy filing in January 2009, Daufuskie had an existing claim against VDM/T for foreclosure.<sup>3</sup> Thus, as of January 2009, when Daufuskie filed its chapter 11 bankruptcy case, the Daufuskie Notes, and the Guaranty, were already in default. Clearly,

<sup>3</sup> Pursuant to South Carolina Rule of Evidence 201, the Court takes judicial notice of Daufuskie's Schedule B, filed January 20, 2009 and Amended Schedule B, filed March 6, 2009, both filed in Daufuskie's chapter 11 bankruptcy case, Case No. 09-00389-jw.

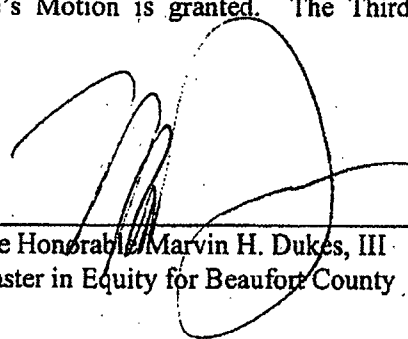
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substantially more than three years elapsed between Daufuskie's 2009 bankruptcy filing and Daufuskie's filing of its Third-Party Complaint in April 2014. Because more than three years have elapsed since Daufuskie's claim on the Guaranty arose, pursuant to S.C. Code § 15-3-530, the applicable statute of limitations, Daufuskie's Third-Party Complaint is time-barred and must be dismissed.

### CONCLUSION

For the reasons set forth above, Travaglione's Motion is granted. The Third-Party Complaint against Travaglione is dismissed.

AND IT IS SO ORDERED.



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The Honorable Marvin H. Dukes, III  
Master in Equity for Beaufort County


September 17 2014

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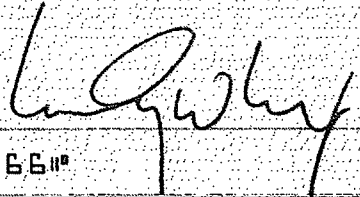
**LAW OFFICES OF LINDSEY W. COOPER, JR.**  
 36 BROAD STREET  
 CHARLESTON, SC 29401

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67-187/532

DATE 10-23-2014

PAY TO THE ORDER OF South Carolina Court of Appeals \$ 100.00  
One hundred dollars & DOLLARS 

*The Bank of South Carolina*  
 CHARLESTON, SOUTH CAROLINA

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SC Court of Appeals

OCT 24 2014

**R LINDSEY W COOPER**