

EXHIBIT A

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

2014 DEC 10 AM 3:00

CIVIL ACTION NO.: 2013-CP-07-0610

First South Bank,

Plaintiff,

vs.

John E. Rosenberg, and Philip J. Brust,

Defendants.

BEAUFORT COUNTY, SOUTH CAROLINA
COURT OF COMMON PLEAS

ORDER DENYING DEFENDANT PHILIP J. BRUST'S MOTION TO AMEND ANSWER AND CROSSCLAIMS AGAINST DEFENDANT JOHN E ROSENBERG

THIS MATTER came before the Court on Defendant Philip J. Brust's Motion to Amend Answer and Crossclaims Against Defendant John E. Rosenberg ("Motion"). A hearing was held on August 13, 2014, before the Honorable Marvin H. Dukes, III, Special Circuit Court Judge and Master-in-Equity for the County of Beaufort, State of South Carolina. Present at the hearing were Jeffrey L. Silver, Esq., counsel for Plaintiff, and Robert E. Sumer, IV, Esq. and E. Brandon Gaskins, Esq., counsel for Defendant Philip J. Brust ("Brust"). Based upon a review of the pleadings, affidavits filed of record, discovery, and applicable law, and hearing arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Summons and Complaint ("Complaint") were filed on March 8, 2013, and properly served on Defendants John E. Rosenberg ("Rosenberg") and Philip J. Brust ("Brust").

2. On September 9, 2013, Brust filed his Answer to Plaintiff's Complaint and Crossclaims against Rosenberg ("Answer").

3. In his Answer, Brust asserted a defense which alleged that Plaintiff's claims are barred in whole or in part, because Plaintiff's alleged losses were the result of Plaintiff's failure to follow its own

policies and procedures and negligence in the underwriting, approval and administration of the loan in question ("Loan") ("Seventh Defense").

4. The Answer also includes a defense which alleges Brust should be released from any obligations under the Unlimited Guaranty which is the subject of this action ("Guaranty") to the extent that Plaintiff breached its duty of good faith and fair dealing to Brust ("Tenth Defense").

5. On October 28, 2013, Plaintiff filed its Motion for Summary Judgment as to Brust which was supported by the Affidavit of Patrick Wright ("Wright").

6. Brust took the deposition of Wright, Plaintiff's Rule 30(b)(6) representative, on May 23, 2014.

7. Brust filed the present Motion on June 2, 2014, and attached thereto was his proposed Amended Answer to Plaintiff's Complaint, Crossclaims against Defendant John E. Rosenberg and Counterclaims against First South Bank ("Amended Answer").

8. The Motion states that the proposed Amended Answer arises out of the same disputed facts as the original Answer and does not raise novel legal issues that are not related to the issues already contained in the pleadings.

9. The Motion also states that the only change made to the Answer was the addition of counterclaims against Plaintiff allegedly uncovered during Wright's deposition.

10. With regard to the Amended Answer, it contains a proposed counterclaim that alleges Plaintiff owed Brust a duty to act reasonably and to comply with standard banking practices in the underwriting, closing, and administration of the Loan, that Plaintiff breached said duty, and that Brust suffered considerable financial injury as a result ("First Counterclaim").

11. The Amended Answer also contains a second proposed counterclaim which alleges that Plaintiff owed Brust a duty of good faith and fair dealing with regard to the Loan and Guaranty, that

Plaintiff breached same, and that Brust suffered considered financial injury as a result ("Second Counterclaim").

12. A hearing was held on Plaintiff's Motion for Summary Judgment on June 3, 2014, and the Court heard arguments concerning (i) Rosenberg's authority to execute the Guaranty on Brust's behalf, (ii) Plaintiff's alleged failure to follow its own policies and procedures with regard to the execution of the Guaranty, the closing of the Loan, and the administration of same, and (iii) Plaintiff's alleged breach of its duty of good faith and fair and fair dealing.

13. On July 31, 2014, the Court issued an Order Granting Plaintiff's Motion for Summary Judgment as to Defendant Philip J. Brust ("Order") wherein it found, among other things, that Plaintiff was not negligent for its alleged failure to follow its own policies and procedures and that Plaintiff did not breach its alleged duty of good faith and fair dealing to Brust.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Court hereby concludes as follows:

1. This Court has subject matter and personal jurisdiction over the parties, and this matter is properly before the Court.

2. "A pleading which sets forth a cause of action, whether an original claim, counterclaim, cross-claim or third-party claim shall contain (1) a short and plain statement of the grounds including facts and statute upon which the Court's jurisdiction rests, unless the Court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief and, (3) a prayer or demand for judgment for the relief which he deems himself entitled." Rule 8(a), SCRCPP.

3. Pursuant to Rule 8(c), SCRCPP, "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation" Rule 8(c), SCRCPP.

4. As set forth in the Order, the Court determined it had jurisdiction to hear arguments related to the Seventh Defense and Tenth Defense.

5. Also, the Seventh Defense and Tenth contain a short and plain statements of facts showing that Brust is entitled to relief, said statements being that Plaintiff failed to follow its own policies and procedures and was negligent in the underwriting, approval and administration of the Loan and that Plaintiff allegedly breach a duty of good faith and fair dealing to Brust.

6. The Seventh Defense and Tenth also contain prayers or demands for judgment or relief in the form of set-offs, as same state that Plaintiff's claims are barred in whole or in part or that Brust is entitled to a release from his obligations under the Guaranty.

7. Therefore, the Seventh Defense is the same as the First Counterclaim as both allege that Plaintiff owed a duty to Brust, that Plaintiff breached its duty when it allegedly failed to follow its own policies and procedures and standard banking practices for the underwriting, closing and administration of the Loan and Guaranty, and that Brust sustained considerable financial injury and is entitled to damages in the form of a set-off as a result.

8. In like manner, the Tenth Defense is the same as the Second Counterclaim as both allege that Plaintiff allegedly breached and alleged duty of good faith and fair dealing to Brust with regard to the execution of the Guaranty, the closing of the Loan and the administration of same.

9. *Res Judicata* is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privy, and it ends litigation, promotes judicial economy, and avoids the harassment of re-litigation of the same issues. Pharmacists Mut. Ins. Co. v. Cincinnati Ins. Co., 658 F. Supp. 2d 745 (D.S.C. 2009).

10. *Res Judicata* requires proof of three elements: 1) a final, valid judgment was entered on the merits; 2) the parties to both suits are the same; and 3) the subsequent action involves matters properly included in the first action. Judy v. Judy, 383 S.C. 1, 677 S.E. 2d 213 (S.C. Ct. App. 2009).

11. It bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between the parties. Plott v. Justin Enterprises, 374 S.C. 504, 511, 649 S.E. 2d, 92, 96 (S.C. Ct. App. 2007).

12. A different remedy does not alter the fact that the claims are identical. Id.

13. A party may not evade a final judgment dismissing his claim by dressing up the same claim in different legal terms or recasting it according to a new legal theory. McMahan v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, 858 F. Supp. 529 (D.S.C. 1994).

14. Also, summary judgment is considered final and on the merits for purposes of *res judicata*. Id.

15. As to the first element, the Court's Order constitutes a final judgment on the merits as to the First Counterclaim and Second Counterclaim as they are merely a repackaging and recasting of the Seventh Defense and Tenth Defense.

16. As to the second element, the parties are identical as Plaintiff and Brust are parties to both actions.

17. As to the third element, the subject matter of the First Counterclaim and Second Counterclaim was properly included and disposed of by the Court's Order as the Seventh Defense and Tenth Defense and First Counterclaim and Second Counterclaim arise out of the execution of the Guaranty, the closing of the Loan, and the administration of same.

18. Therefore, *res judicata* bars the First Counterclaim and Second Counterclaim as Plaintiff would suffer prejudice as a result of having to re-litigate the matters alleged in same.

STANDARD OF REVIEW

Pursuant to Rule 15(a), SCRPC "A party may amend his pleadings by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice the other party." "It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice..." City of N. Myrtle Beach v. Lewis-Davis, 360 SC 225, 233, 559 S.E. 2d 462 (S.C. Ct. App. 2004). Relatedly, "[w]hile this power should not be used indiscriminately or to prejudice or surprise another party, the decision to allow an amendment is within the sound discretion of the trial court..." Id. (internal citations omitted) (emphasis added).

ORDER

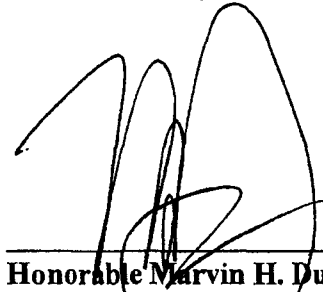
Based upon the foregoing Findings of Fact and Conclusions of Law, Brust's Motion to Amend is hereby denied.

In its Order, the Court found it had jurisdiction to hear arguments concerning the Seventh Defense and Tenth Defense and decide the merits of same. Also, the Seventh Defense and Tenth Defense each contain short plain statements of facts alleging that Brust is entitled to relief, said statements being that Plaintiff was allegedly negligent and breached its duty of good faith and fair dealing with regard Brust, the execution of the Guaranty, the closing of the Loan, and the administration of same. Furthermore, the Seventh Defense and Tenth Defense contain prayers or demands for judgment or relief in the form of a set-off as they state that Plaintiff's claim is barred in whole or in part and that Brust should be relieved of his liability under the Guaranty. Therefore, the Seventh Defense and the First Counterclaim are the same, and, in like manner, the Tenth Defense and Second Counterclaim are the same.

Accordingly, the First Counterclaim and Second Counterclaim are barred under *res judicata* as they were previously denied in the Order by virtue of the Court's denial of the Seventh Defense and Tenth Defense. As to the first element of *res judicata*, a final judgment on the matter has been entered in the form of the Order. As to the second element, the identities of the parties are identical. As to the third element, the matters alleged in the First Counterclaim and Second Counterclaim were properly included and disposed of in the Order by virtue Court's denial of the Seventh Defense and Tenth Defense as same arose out of the same transaction or occurrence. Accordingly, the proposed First and Second Counterclaims are barred by *res judicata*. It is therefore,

ORDERED ADJUDGED, AND DECREED, that Brust's Motion to Amend is hereby denied as allowance of the Amended Answer and included First Counterclaim and Second Counterclaim would prejudice Plaintiff and force same to re-litigate matters barred by *res judicata*.

IT IS SO ORDERED.



**Honorable Marvin H. Dukes, III
Special Circuit Court Judge and
Master-In-Equity for Beaufort County**

Dated: 12/2, 2014
Beaufort, South Carolina

EXHIBIT B

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF BEAUFORT
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NO.: 2013-CP-07-610

John E. Rosenberg and Philip J. Brust.

First South Bank,

PLAINTIFF,

| | |
|--|---|
| Submitted by: TYLER, CASSELL, JACKSON PEACE & SILVER, LLC Jeffrey L. Silver 1331 Elmwood Avenue, Suite 300 (29201) Post Office Box 11656 Columbia, South Carolina 29211 | Attorney for: <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant |
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DISPOSITION TYPE (CHECK ONE):

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial/hearing before the court. The issues have been tried or heard and decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding Arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____
 NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE COURT RULING IN THIS APPEAL.

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IT IS ORDERED AND ADJUDGED: See attached order. (Formal order to follow)
 Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
 Additional Information for the Clerk :

| INFORMATION FOR THE PUBLIC INDEX | | |
|--|--|--|
| Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below. | | |
| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
| First South Bank | Philip J. Brust | \$1,746,260.73, plus pre-judgment interest from May 23, 2014, through the entrance of the judgment at the per diem rate of \$234.50 Attorney Fees and Costs in the sum of \$47,388.73 |
| If applicable, describe the property, including tax map information and address, referenced in the order: | | |

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Marvin H. Dukes, II, 14th Judicial Circuit

2014 APR 5 12:23

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BEAUFORT)
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 First South Bank,)
)
 Plaintiff,)
)
 vs.)
)
 John E. Rosenberg, and Philip J. Brust,)
)
 Defendants.)
 _____)

IN THE COURT OF COMMON PLEAS
 CIVIL ACTION NO.: 2013-CP-07-0610

**ORDER GRANTING PLAINTIFF'S
 MOTION FOR SUMMARY JUDGMENT
 AS TO DEFENDANT
 PHILIP J. BRUST**

FILED
 MAR 25 5 11:12:23
 CLERK OF COURT

THIS MATTER came before the Court on Plaintiff's Motion for Summary Judgment as to Defendant Philip J. Brust ("Motion"). A hearing was held on May 23, 2014, before the Honorable Marvin H. Dukes, III, Special Circuit Court Judge and Master-in-Equity for the County of Beaufort, State of South Carolina. Present at the hearing were Jeffrey L. Silver, Esq., counsel for Plaintiff, and Robert E. Sumner, IV, Esq. and E. Brandon Gaskins, Esq., counsel for Defendant Philip J. Brust. Based upon the pleadings, affidavits filed of record, discovery, applicable law, and such other argument of counsel, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Summons and Complaint ("Complaint") were filed on March 8, 2013, and same were properly served on Defendants John E. Rosenberg ("Rosenberg") and Philip J. Brust ("Brust").
2. Brust filed a Motion to Dismiss for lack of personal jurisdiction which was denied by the Court on August 22, 2013.
3. Soon thereafter, Brust answered the allegations contained in Plaintiff's Complaint and alleged various Crossclaims against Rosenberg ("Answer").
4. In his Answer, Brust denied the material allegations of Plaintiff's Complaint and alleged, among other things, that (i) Rosenberg did not have actual or apparent authority to sign the

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below described Unlimited Guaranty ("Guranty"), (ii) Plaintiff was negligent in failing to follow its own policies and/or procedures, (iii) Plaintiff breached its duty of good faith and fair dealing, and (iv) Plaintiff modified the Loan and consequently, Brust is not liable under the Guaranty and/or his liability under same should be reduced or discharged.

5. Plaintiff has already obtained judgment against Rosenberg by virtue of a Consent Order on Plaintiff's Motion for Summary Judgment filed October 2, 2013.

6. Plaintiff filed the present Motion and Affidavit in Support of the Motion of Patrick Wright on October 28, 2013.

7. Brust has also filed a Notice of Motion and Motion to Amend Answer and Crossclaims ("Motion to Amend") on June 2, 2014 which had attached to it the proposed Defendant Philip J. Brust's Amended Answer to Plaintiff's Complaint, Crossclaims against Defendant John E. Rosenberg and Counterclaims against First South Bank ("Amended Answer").

8. The counterclaims in the Amended Answer contain the same material allegations as those set forth as defenses in Brust's Answer.

9. Brust is a member of Ecological Investments, LLC ("Ecological"), a limited liability company organized under and existing pursuant to the laws of the State of South Carolina.

10. In or around late 2005, Ecological entered into negotiations with Plaintiff for the purpose of obtaining a loan in the amount of Two Million Six Hundred Thousand and No/100 (\$2,600,000.00) Dollars ("Loan").

11. In connection therewith, Plaintiff issued a commitment letter to Ecological, Brust, and Rosenberg ("Commitment Letter"), said Commitment Letter being dated January 9, 2006.

12. The Commitment Letter informed Brust that he would be required to personally guaranty the Loan, that his personal guaranty of the Loan would be condition to Ecological receiving

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same and that he would provide copies of his personal financial information in connection therewith during the Loan's repayment period.

13. The Commitment Letter also informed Brust that the Loan documents and the terms thereof would prevail over the terms of the Commitment Letter.

14. Brust acknowledged and accepted the terms of the Commitment Letter by signing same.

15. In connection with the Loan, Brust executed a Specific Limited Power of Attorney ("Power of Attorney") wherein he appointed Rosenberg as his true and lawful attorney and vested him with authority to execute, as his act and deed, any document, instrument, contract, note, mortgage, agreement, affidavit, disclosure, etc., and to pay on his account or to execute any such documents as may be necessary to close the Loan.

16. The Power of Attorney also declared that any act or deed lawfully performed by Rosenberg pursuant to the Power of Attorney would be binding upon Brust.

17. The Power of Attorney was filed in the Office of the Register of Deeds for Jasper County, South Carolina, on February 2, 2006, in Book 339 at Page 218.

18. On February 2, 2006, Ecological made, executed, and delivered to Plaintiff a Universal Note and Security Agreement ("Note") in the original principal sum of Two Million Six Hundred Thousand and No/100 (\$2,600,000.00) Dollars.

19. To secure the Note, Rosenberg, as Brust's attorney-in-fact, executed the Guaranty in which Brust absolutely and unconditionally guaranteed payment and performance of any and all debts, liabilities, and obligations which Ecological owed Plaintiff.

20. Plaintiff accepted the Guaranty based on the representations in the Power of Attorney and relied on same.

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21. According to its terms, the Guaranty is continuing and shall continue to be enforced and binding upon Brust until it is revoked by written notice actually received by Plaintiff, and such revocation shall not be effective as to indebtedness existing or committed for at the time of actual receipt of such notice by Plaintiff or as to any renewal, extension, or refinancing thereof.

22. Under the Guaranty, Brust agreed to pay or reimburse Plaintiff for all costs and expenses, including reasonable attorney's fees and legal expenses incurred by Plaintiff in connection with the protection, defense, or enforcement of the Guaranty and any litigation, bankruptcy, or insolvency proceeding.

23. Subsequently thereafter, and from time to time, Plaintiff and Ecological renewed and/or modified the Note by certain Commercial Debt Modification Agreements dated January 14, 2008 and January 21, 2010, and Renewal Universal Note and Security Agreements dated May 27, 2008, August 26, 2008, October 15, 2008, and November 30, 2008 (collectively "Renewals").

24. The Note, Renewals, and Guaranty directly relate to the Loan and any and all amounts due and owing thereunder represent the only indebtedness Ecological and Brust owe Plaintiff.

25. From 2005 through 2010, Brust voluntarily provided Plaintiff, to support his personal obligations, with his personal financial information in compliance with Plaintiff's request and the terms of the Commitment Letter.

25. During the Loan's repayment, Brust did not revoke or repudiate the Guaranty nor did he dispute Rosenberg's execution of same.

26. Brust has not revoked the Power of Attorney.

27. The Note matured on November 30, 2012.

28. Plaintiff made demand upon Ecological for payment of the Note in full and Ecological has failed and refused to deliver same.

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29. Plaintiff made demand upon Brust for payment of the Guaranty in full, and he has failed and refused to deliver same.

30. As of May 23, 2014, there is due and owing under the terms of the Guaranty, the principal sum of \$1,608,000.00, plus pre-judgment interest through May 23, 2014, in the sum of \$133,683.67, plus accrued late charges in the sum of \$2,348.49, plus advanced real property taxes in the sum of \$713.07, plus advanced appraisal fees in the sum of \$1,450.00, plus advanced costs in the sum of \$65.50 for a total outstanding balance of \$1,746,260.73, plus pre-judgment interest from May 23, 2014, at the per diem rate of \$234.50.

31. As documented by the Affidavit of Jeffrey L. Silver, Esq., Plaintiff has incurred the actual sum of \$43,843.00 in attorney's fees and the sum of \$3,545.73 in court costs for a total of \$47,388.73 which is a fair and reasonable award for the attorney fees and court costs given (1) the nature of these proceedings, (2) the time actually devoted to the matter; (3) the professional standing of attorney who regularly represents clients in matters of this type as a partner in an AV rated firm; and (4) for the beneficial results that client has received.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Court hereby concludes as follows:

1. This Court has subject matter and personal jurisdiction over the parties, and this matter is properly before the Court.

2. An "'agent' is one appointed by a principal as his representative and to whom the principal confides the management of some business to be transacted in the principal's name or on his account and who brings about or effects legal relationships between the principal and third parties". Collection County Taxpayers Ass'n v. School Dist. of Colleton County, 638 S.E.2d 685, 693, 371 S.C. 224, 239 (2006) (citing Thompson v. Ford Motor Co., 21 S.E.2d 34, 43, 200 S.C. 393, 414 (1942)).

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3. An agent's authority is composed of his actual authority, whether express or implied, together with the apparent authority which the principal, by his or her conduct, is precluded from denying. Roberson v. Southern Finance of South Carolina, Inc., 615 S.E.2d 112, 115, 365 S.C. 6, 10 (2005).

4. The doctrine of apparent authority focuses on the principal's manifestation to a third party, and the proper focus is on the relationship between the principal and the third party. Charleston, S.C. Registry for Golf & Tourism v. Young, Clement Rivers & Tisdale, LLP, 598 S.E.2d 717, 721, 359 S.C. 635, 642-3 (S.C. Ct. App. 2004) (citing R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth., 450 S.E.2d 113, 343 S.C. 433 (S.C. Ct. App. 2000)).

5. Apparent agency is proved by the purported principal consciously or impliedly representing another to be his agent, by a third party's reliance upon the representation, and a change of position by the principal to the relying party's detriment. Cowburn v. Leventis, 619 S.E.2d 437, 448, 366 S.C. 20, 39 (S.C. Ct. App. 2005).

6. When a principal, by such acts or conduct, knowingly has caused or permitted another to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith, and in the exercise of reasonable prudence, dealt with the agent on the faith of such appearances. R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth., 450 S.E. 2d 118, 343 S.C. 424 (S.C. Ct. App. 2000).

7. When a principal's manifestation of an agent's authority is stated in a power of attorney, it is subject to the contractual rules of interpretation, including the principle that a single provision of the instrument should be read in the context of the entire instrument. Restatement (Third) of Agency §3.01 rpt's. note b. (2006) (citing Schmitz v. Firststar Bank, 658 N.W. 2d 442, 448-9 (Wisc. 2003)).

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8. Also, the cardinal rule of contract interpretation is to ascertain and give effect to the parties' intentions as determined by the contract language. Middleton v. Eubank, 694 S.E.2d 31, 34, 388 S.C. 8, 14 (S.C. Ct. App. 2010) (citing McGill v. Moore, 672 S.E.2d 571, 574, 381 S.C. 179, 185 (2009)).

9. Additionally, "[w]here a written instrument's language is clear and unambiguous, the language alone determines its force and effect..." and the Court is without authority to alter an unambiguous contract or to make new contracts for the parties. Davis v. KB Home of South Carolina, Inc., 713 S.E.2d 799, 805, 394 S.C. 119, 127 (S.C. Ct. App. 2011); U.S. Bank Trust Nat. Ass'n v. Bell, 684 S.E.2d 199, 385 S.C. 364 (S.C. Ct. App. 2009).

10. Furthermore, a principal can ratify the unauthorized acts of an agent by acceptance by the putative principal of the benefit of the acts by the putative agent, full knowledge of the fact by the putative principal, and circumstances or an affirmative election demonstrating the putative principal's intent to accept the unauthorized actions. Nationwide Mut. Ins. Co. v. Powell, 292 F. 3d 201 (4th Cir. 2002).

11. The principal will be held to have ratified the unauthorized acts of his agent unless his disaffirms same within a reasonable time. Foxworth v. Murchison Nat. Bank, 134 S.E. 428, 136 S.C. 458 (1928).

12. The Power of Attorney is clear and unambiguous as it is susceptible to only one meaning and represents Brust's intention, namely, to give Rosenberg the authority to execute, on his behalf, any and all documents and to perform any act related to the closing of the Loan, including the execution of the Guaranty, and to be bound by same.

13. As such, Rosenberg had actual authority to execute the Guaranty and Brust is bound by the terms of same.

14. Rosenberg had apparent authority to execute the Guaranty on Brust's behalf as Brust represented to Plaintiff that Rosenberg had authority to execute the Guaranty pursuant to the Power of

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Attorney, Plaintiff relied on same in the consummation of the Loan and execution of the Note and Renewals, and Plaintiff, in good faith, relied on Brust's representations when it closed the Loan.

15. As such, Brust is estopped from denying Rosenberg's apparent authority.

16. Brust also ratified the execution of the Guaranty as he enjoyed the benefits of the Loan as a member of Ecological, had full knowledge of the facts as he provided his personal financial information from 2005 through 2010 and signed the Commitment Letter, and he affirmatively elected an intention to adopt Rosenberg's acts by making no written repudiation or revocation of the Guaranty during the term of repayment of the Note and Renewals.

17. As Brust did not revoke or repudiate the Guaranty or complain of same until the institution of this action, he did not disaffirm Rosenberg's actions within a reasonable period of time.

18. Additionally, it is the law of this State that a normal bank/depositor arrangement creates a creditor/debtor relationship rather than a fiduciary one absent showing otherwise. Burwell v. South Carolina Nat. Bank, 340 S.E.2d 786, 288 S.C. 34 (1986).

19. Relatedly, the South Carolina Supreme Court has squarely rejected the contention that a bank's policy manual creates a duty by the bank to a borrower. See Citizens and Southern National Bank of South Carolina v. Lanford, 540 S.E.2d 549, 313 S.C. 443 (S.C. 1994).

20. As no fiduciary duty has been alleged, a creditor/debtor relationship exists between Plaintiff and Brust and Plaintiff's policy manual creates no duty between Plaintiff and Brust.

21. As such, any alleged failure by Plaintiff to follow its own policies and procedures, which is denied by Plaintiff, does not constitute a breach of any duty Plaintiff owed Brust and does not relieve Brust of liabilities under the Guaranty.

22. Also, the law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document. Regions Bank v. Schmauch, 582 S.E.2d 432, 440, 354 S.C.

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648, 664 (S.C. Ct. App. 2003) (citing Citizens v. N. Nat'l Bank of South Carolina v. Lanford, 443 S.E. 2d 549, 551, 313 S.C. 540, 545 (1994)).

23. Further, a person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it and he owes a duty to the other party to the contract and to the public to learn the contents of a document before he reads it. Id.

24. In other words, one who signs a written instrument has the duty to exercise reasonable care to protect himself. Id.

25. As Brust, through Rosenberg, had the affirmative duty to read the Guaranty and Plaintiff had no duty to him other than those set forth in the Guaranty, Plaintiff did not breach any duty of good faith and fair dealing to Brust.

26. The Renewals also do not relieve Brust of his liability under the Guaranty as same relate to the Loan, and he agreed to repay same under the clear and unambiguous terms of the Guaranty. See Davis v. KB Home of South Carolina, Inc., 713 S.E.2d 799, 394 S.C. 119 (S.C. Ct. App. 2011); U.S. Bank Trust Nat. Ass'n v. Bell, 684 S.E.2d 199, 385 S.C. 364 (S.C. Ct. App. 2009).

27. As to Brust's Motion to Amend, "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation." S.C. R. CIV. P. 8(c).

28. The counterclaims set forth in the Amended Answer contain the same material allegations as the defenses set forth in the Answer.

29. Accordingly, the counterclaims contained in the Amended Answer are and shall be treated as the defenses contained in the Answer and disposed of herein.

30. Brust's failure to pay any and all sums due under the Guaranty constitutes a default under the terms thereof and is a material breach of same.

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31. As of May 23, 2014, there is due and owing under the terms of the Guaranty, the principal sum of \$1,608,000.00, plus pre-judgment interest through May 23, 2014, in the sum of \$133,683.67, plus accrued late charges in the sum of \$2,348.49, plus advanced real property taxes in the sum of \$713.07, plus advanced appraisal fees in the sum of \$1,450.00, plus advanced costs in the sum of \$65.50 for a total outstanding balance of \$1,746,260.73, plus pre-judgment interest from May 23, 2014, at the per diem rate of \$234.50.

32. The Plaintiff has incurred the actual sum of \$43,843.00 in attorney's fees and the sum of \$3,545.73 in court costs for a total of \$47,388.73 which is a fair and reasonable award for the attorney fees and court costs given (1) the nature of these proceedings, (2) the time actually devoted to the matter; (3) the professional standing of attorney who regularly represents clients in matters of this type as a partner in an AV rated firm; and (4) for the beneficial results that client has received. 2

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Legette v. Piggly Wiggly, Inc., 629 S.E. 2d 375, 368 S.C. 576 (S.C. Ct. App. 2006). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings, but rather must come forward with specific facts showing a genuine issue for trial. Singleton v. Sherer, 659 S.E. 2d 196, 377 S.C. 185 (S.C. Ct. App. 2008). Likewise, when a motion for summary judgment is made and supported by affidavit, the adverse party may not rest on the mere allegations or denials of the pleadings, but his response by affidavit as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial. Klippel v. Mid-Carolina Oil, Inc., 399 S.E.2d 163, 303 S.C. 127 (S.C. Ct. App. 1990).

ORDER

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Based upon the foregoing Findings of Fact and Conclusions of Law, Plaintiff's Motion for Summary Judgment is hereby granted. Based on the above, Rosenberg had actual and apparent to execute the Guaranty on Brust's behalf pursuant to the Power of Attorney. Also, Brust through his actions or lack thereof, ratified Rosenberg's actions with respect to the Guaranty. Accordingly, Brust is liable under the terms of the Guaranty.

Additionally, a debtor/creditor relationship existed between Plaintiff and Brust. As such, Plaintiff was under no duty to Brust to follow its policies and procedures with regard to the Loan and it was under no duty to explain the terms of the Guaranty to Rosenberg on behalf of Brust. Accordingly, Plaintiff did not breach any alleged duty to Brust. Also, under the clear unambiguous terms of the Guaranty, Brust agreed to repay the Renewals which directly relate to the Loan. Furthermore, the counterclaims contained in Brust's Amended Answer are the same as the defenses set forth in the Answer. As such, they, like Brust's defenses, are lack merit. Finally, Brust's failure to provide payment of all sums due and owing under the Guaranty constitute a material breach of same, and Plaintiff is entitled to judgment in an amount due and owing thereunder. It is therefore,

ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion for Summary Judgment is hereby granted, it is further,

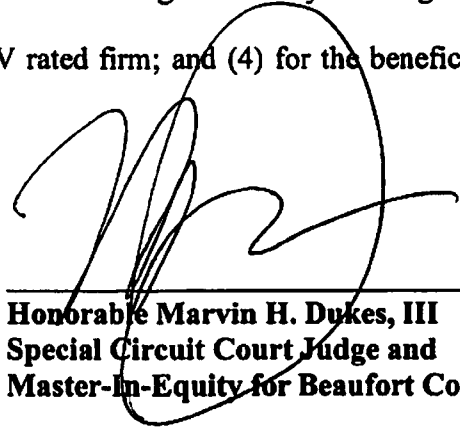
ORDERED, ADJUDGED, and DECREED that Plaintiff shall have judgment against Brust on the Unlimited Guaranty in the sum of \$1,746,260.73, plus pre-judgment interest from May 23, 2014, through the entrance of the judgment at the per diem rate of \$234.50, plus post-judgment interest at the maximum statutory rate, and it is further,

ORDERED, ADJUDGED, and DECREED that Plaintiff shall have judgment against Brust on the Unlimited Guaranty for attorney's fees and costs in the amount of \$47,388.73 which is a fair and reasonable award for the attorney fees and court costs given (1) the nature of these proceedings, (2) the

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time actually devoted to the matter; (3) the professional standing of attorney who regularly represents clients in matters of this type as a partner in an AV rated firm; and (4) for the beneficial results that client has received.

IT IS SO ORDERED.



**Honorable Marvin H. Dukes, III
Special Circuit Court Judge and
Master-In-Equity for Beaufort County**

Dated: 7/31, 2014
Beaufort, South Carolina

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