THE STATE OF SOUTH CAROLINA
In the Court of Appeals



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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, Master in Equity

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Case No. 2014-CP-07-0380

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

v.

Raymond Travaglione, Respondent.

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# INITIAL BRIEF OF APPELLANT

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I. WHETHER THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION TO DISMISS APPELLANT'S THIRD-PARTY COMPLAINT BY FINDING THIS ACTION TO BE BARRED BY A THREE-YEAR STATUTE OF LIMITATIONS.

## STATEMENT OF THE CASE

On February 19, 2014, JMT Capital Holdings, LLC ("JMT") brought the underlying action seeking to foreclose its mortgage against VDM/T Land Company, LLC ("VDM/T") and seeking a declaratory judgment that its lien was a valid and enforceable first mortgage lien against the two parcels of real property at issue (the "Property"). (*See* Pl. Compl. at p. 5, ¶ 20.) Appellant Daufuskie Island Properties, LLC ("DIP") and its successor-in-interest Ace Basin Investments, LLC ("Ace Basin," and collectively with DIP, "Appellant") was named as a defendant by virtue of its status as a purchase money mortgagor and lienholder on the Property. The underlying foreclosure litigation is ongoing.

On April 16, 2014, Appellant answered JMT's Complaint, denying that JMT held a first mortgage lien against the Property, but agreeing that JMT is entitled to foreclose its mortgage as a mortgage holder in second position. In addition, Appellant brought a third-party complaint against Respondent, seeking to recover against Respondent's personal guaranty provided as security for, and in connection with, the promissory notes

securing VDM/T's mortgages on the Property. (*See* App. 3rd Party Compl., Ex. 1 (the "Guaranty")). The Guaranty was given to Appellant, a purchase money lender, that transferred the real property to VDM/T in exchange for the notes, the mortgages, and the Guaranty of VCM/T's owner, the Respondent.

Shortly thereafter, Respondent filed a Motion to Dismiss Appellant's Third-Party Complaint for failure to state a claim upon which relief may be granted. (*See* Resp. Mot. to Dismiss.) The matter was fully briefed, and the trial court held a hearing on August 11, 2014. (*See* Hearing Transcript of Aug. 11, 2014.) On September 25, 2014, the Honorable Marvin H. Dukes entered an order granting Respondent's Motion to Dismiss on the grounds that the three year statute of limitations for general contracts, rather than the narrower twenty year statute of limitations governing written contracts securing mortgages for real property as well as sealed instruments, applied to Respondent's Guaranty. (*See* Order of Sept. 25, 2014 (the "Order").)

On or about October 23, 2014, Appellant served a timely Notice of Appeal on Respondent; however, upon reconsideration, on November 20, 2014, Appellant filed a Motion to Hold the Appeal in Abeyance until the conclusion of the underlying litigation. Respondent filed its Objection to

Appellant's Motion on or about December 8, 2014. This Court denied such Motion on January 16, 2015, and ordered Appellant to file its initial brief and designation of matter within thirty days.

## RELEVANT FACTS

Pursuant to certain Partial Release and Subordination Agreements between VDM/T and DIP, VDM/T executed and delivered to DIP one promissory note in the amount of Four Hundred Thousand and 00/100 Dollars ($400,000.00) and one promissory note in the amount of One Hundred Thousand and 00/100 Dollars ($100,000.00) (collectively, the "Notes"). (*See* Attachments to App. Corr. to J. Dukes of Sept. 5, 2014.) The Notes specifically provide for and refer to the mortgages that secure the Notes and were filed in Beaufort County.

As required by the Notes, VDM/T delivered two mortgages to and in favor of DIP against the Property (the "Mortgages"). (*See* Pl. Compl. Exs. C & D). In exchange for the Notes and Mortgages, DIP transferred the Property to VDM/T. Because DIP was the seller of the Property and the lender, the Mortgages are purchase money mortgages.

Respondent Travaglione executed and delivered a personal Guaranty to DIP as additional security for the Notes and Mortgages. (*See* App. 3rd Party Compl., Ex. 1.) The Notes were specifically incorporated by

reference into Travaglione's Guaranty (*see* App. 3rd Party Compl., Ex. 1, at p. 1, ¶ 7) and were secured by the Mortgages of real property which were also incorporated by reference into the Guaranty. (*See* App. 3rd Party Compl., Ex. 1, at p. 1, ¶ 5). Based on the incorporating language, the parties unambiguously intended that the Notes, Mortgages, and Guaranty be considered as a single document related to the transfer of real property from DIP to VDM/T.

In addition, the Guaranty was secured by the Property of the Respondent, and the Guaranty specifically states:

> As security for the amount guaranteed by the undersigned, Guarantor hereby grants to Lender a security interest in, a general lien upon and/or right of setoff of the following ("Collateral"): . . . instruments, . . . documents, . . . any other property, rights and interest of the undersigned now or hereafter existing, which at any time shall come into the possession or custody or under the control of Lender.

(*See* App. 3rd Party Compl., Ex. 1 at p. 2.) The Mortgage was an instrument, or document, and represents a right and interest in the real property of VDM/T that was wholly owned by Respondent that came into the possession, custody, and control of DIP.

The Respondent and DIP further made clear that the effect of the Guaranty was to extend the limitations period until such time that the Note and Mortgage were satisfied:

> "Nothing except payment to Lender of the full amount of the Note together with interest thereon and all other costs and expenses paid or incurrent by Lender in the collecting and/or enforcing the amount of Borrower's obligation guaranteed hereunder shall terminate the obligations of the undersigned to Lender incurred hereunder."

(*See* App. 3rd Party Compl., Ex. 1 at p. 3.) The parties to the Guaranty agreed that the Guaranty would be effective until such time that the Note, secured by the Mortgage, was satisfied.

Directly 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" followed by "SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF:" followed by the signatures of Respondent Travaglione as guarantor and two witnesses. (*See* App. 3rd Party Compl., Ex. 1, at p. 2.)

## ARGUMENT

I. WHETHER THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION TO DISMISS APPELLANT'S THIRD-PARTY COMPLAINT BY FINDING THIS ACTION TO BE BARRED BY A THREE-YEAR STATUTE OF LIMITATIONS.

The trial court erred in not applying the twenty year statute of limitations that governs sealed instruments and instruments secured by a mortgage to real property. Respondent filed its Motion to Dismiss Appellant's Third-Party Complaint against Respondent Travaglione on

three grounds (*see* Resp. Mot. to Dismiss); however, the trial court granted Respondent's Motion to Dismiss based solely on Respondent's contention that the applicable limitations period for suit on a guaranty is three years under S.C. Code Ann. § 15-3-530 (1976 & Supp. 2003). This statute of limitations governs contracts in general, and is differentiated from the twenty year of statute of limitations under S.C. Code Ann. § 15-3-520 (1976 & Supp. 2003), which is the more specific statute of limitations governing only (1) sealed instruments, and (2) written contracts securing mortgages in real property. (*See* Order of Sept. 25, 2014, at p. 4-7.)

S.C. Code Ann. § 15-3-530 provides that "within three years . . . an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520 [must be commenced]." As such, the plain language of Section 15-3-530 makes clear that Section 15-3-520 is the more specific statute of limitations, whose applicability is to be judged prior to and control over Section 15-3-530.

The full language of S.C. Code Ann. § 15-3-520 is as follows:

> "Within twenty years:
>
> (a) an action upon a bond or other contract in writing secured by a mortgage of real property; [or]
>
> (b) an action upon a sealed instrument . . . [must be commenced]."

S.C. Code Ann. § 15-3-520 (1976 & Supp. 2003).

The Courts in this State have established that, in the context of statutes of limitation, a specific limitation period controls over the more general or ordinary limitations period. *State v. Life Ins. Co. of Georgia*, 254 S.C. 286, 175 S.E.2d 203 (1970). In addition, according to the great weight of authority, "[i]t is established in this State that where there is any doubt as to which of two statutes of limitation applies, the doubt **must** be resolved in favor of the longer period." *Id.* (emphasis added); *see also Scovill v. Johnson*, 190 S.C. 457, 3 S.E.2d 543, 545 (1939) ("A limitation statute is a statute of grace, permitting the avoidance and evasion of the liability; and while given recognition when pleaded, it has never been favored by the Courts. . . . [I]f substantial doubt exists, the longer, rather than the shorter, period of limitation is to be preferred." (internal citations omitted)). Based on this standard, the trial court should have applied the more specific statute of limitations of twenty years.

**A. The Trial Court Erred in Failing to Address Appellant's Argument that Under S.C. Code Ann. Section 15-3-520(a) the Statute of Limitations for an Action Upon a Contract in Writing Secured by a Mortgage in Real Property Is Twenty Years.**

The Guaranty is an instrument that was secured by the mortgage and entered into in connection with the Note and Mortgage related to the sale of real property from DIP to VDM/T. In its Opposition to Third Party

Defendant's Motion to Dismiss, Appellant argued that S.C. Code Ann. § 15-3-520(a) is the applicable limitations period here, where the action is one "upon a bond or other contract in writing secured by a mortgage in real property." (*See* App. Opp. to Mot. to Dismiss.) As such, the limitations period runs for twenty years from the date of breach. The trial court did not consider or specifically discuss this argument in issuing its Order.

It is well established that "[a] guaranty is a contract." *E.g., CoastalStates Bank v. Hanover Homes of South Carolina, LLC, et al.*, 408 S.C. 510, 518, 759 S.E.2d 152, 157 (S.C. Ct. App. 2014) (*quoting TranSouth Fin. Corp. v. Cochran*, 324 S.C. 290, 294, 478 S.E.2d 63, 65 (S.C. Ct. App. 1996)). In this case, the Guaranty is a written, absolute guaranty of repayment of the debt obligations, evidenced by the two Notes and secured by the Mortgages against two parcels of real property. (*See* Pl. Compl., at ¶ 20.)

The trial court failed to address whether S.C. Code Ann. § 15-3-520(a) is the applicable statute of limitations, and instead, found only that: (1) "the statute of limitations for an action on a guaranty begins to run upon default of the obligor," (*see* Order of September 25, 2014, Part 3, subpart b) (*citing CoastalStates Bank v. Hanover Homes of South Carolina, LLC, et al.*, 408 S.C. 510, 759 S.E.2d 152 (S.C. Ct. App. Mar. 26, 2014)); (2) that the

default occurred during or before 2009; and (3) that the three year statute of limitations governing general contracts had run. In its Order, the trial court failed to distinguish between the facts presented in *CoastalStates Bank*, where the guaranty at issue was an absolute guaranty of repayment of three bank loans not secured by mortgages in real property, and the facts presented in this case, where the Guaranty is an absolute guaranty of repayment of Notes secured by the Mortgages in real property. The situation presented in *CoastalStates Bank* warranted the application of the general contract statute of limitations period; whereas, the facts presented in the case at bar fall squarely within the statutory requirements of S.C. Code Ann. § 15-3-520(a) which the legislature unambiguously intended to carry a twenty year limitations period.

In *Scovill v. Johnson*, 190 S.C. 457, 3 S.E.2d 543 (1939), the Supreme Court, interpreting the twenty year statute of limitations, held that the plain language of the statute should govern, particularly where the parties executing an instrument are aware that it is secured by a mortgage of real property.

> "The twenty-year statute [S.C. Code Ann. § 15-3-520] does not deal with persons; it deals strictly with instruments. If the instrument is a 'contract in writing, secured by a mortgage of real property,' it would appear to be immaterial whether liability is asserted against one or all of the parties to the contract, and also immaterial whether the liability for the debt

> is asserted against the respondents as makers or endorsers. Especially is this true when the endorser or endorsers execute the note with knowledge that it was secured by a mortgage of real property. . . . In other words, the respondents herein would have to first overcome the twenty-year statute . . . before claiming the benefit of the [three]-year statute."

*Id.* at 458, 3 S.E.2d at 544. *Scovill* was an action for the foreclosure of a mortgage in which the parties executed a written promissory note securing the payment of the mortgage. The promissory note was made by John A. Johnson and endorsed by E.C. John and Ethel M. Johnson. The endorsers guaranteed any personal judgment against the maker in the event of a default of the mortgage. The Supreme Court held that the note was a contract in writing secured by a mortgage of real property; therefore, all three parties—the one maker and two endorsers—were all subject to the twenty year statute of limitations for liability upon the note under the exact terms of the statute.

These facts are very similar to the case at hand, where the Guaranty's third WHEREAS clause refers to the agreements entered into between DIP and VDM/T for the sale of real property to VDM/T, which was owned by Respondent. Likewise, the Guaranty's fifth WHEREAS clause refers to the purchase money Promissory Notes used to finance the sale between DIP and VDM/T (*see* Pl. Compl. Ex. 1, p. 1, ¶ 7), and the Guaranty was an additional inducement to enter into the sale. The Notes

were incorporated by reference into the Guaranty, and the Notes referred to and were secured by the Mortgages making the Guaranty part and parcel of the note, and vice versa. As such, the Notes and the Guaranty, collectively, were all part of the single contractual transaction related to the sale of real property by DIP to VDM/T that was secured by the Mortgages.

In addition, the Guaranty specifically provides that the Guaranty is to be effective until such time as the Note is satisfied in full, and the Note—which is incorporated into the Guaranty—is secured by the Mortgage. The Note is controlled by the twenty year statute of limitations, and the parties, by incorporating the Note by reference into the Guaranty, provided their clear written intention to have the Guaranty likewise controlled by the twenty year statute of limitations. Thus, *Scovill* dictates and the unambiguous intention of the parties supports that the twenty year statute should apply.

S.C. Code Ann. § 15-3-520 has been also held to apply to principals as well as sureties such that an action may be brought against an obligor on an instrument within twenty years of the breach. *Strain v. Babb*, 30 S.C. 342, 9 S.E. 271 (1889). *Strain* was a suit brought against the estate of a clerk for his failure to enroll a decree. Such failure on the part of the clerk caused the Plaintiffs to lose the amount of the decree. The sureties on the clerk's

bond were held liable to the Plaintiffs where Plaintiffs brought the action within twenty years. *Strain* is similar to the case at bar in that the bond in that case was a security for payment in the event of neglect of the clerk; whereas, Respondent's Guaranty is a security of payment in the event of the default of the obligors of the Note.

In the case at bar, the underlying action is for the foreclosure of Mortgages, whose terms were secured by two promissory Notes and a Guaranty made and executed by Respondent Raymond Travaglione. The Guaranty is itself a written contract securing the payment of the mortgage at issue. The terms of the Guaranty state that:

> "This obligation and liability on the part of Guarantor shall be a primary and not a secondary obligation and liability, payable immediately upon demand without recourse first having been had by Lender against Borrower or any person, firm or corporation. This is a **guarantee of payment** and not of collection. The liability of Guarantor on this Guaranty shall be direct and immediate and not conditioned or contingent upon the pursuit of any remedies against Borrower or any other person, or against any other guarantors, nor against securities or liens available to Lender, its successors, endorsees or assigns.".

*See* Pl. Compl. Ex. 1, p. 3, ¶ 4 (emphasis added).

For the reasons stated above, the twenty year statute of limitations is applicable in this case. It has been less than twenty years between the signing of the Guaranty and the filing of Appellant's Third Party

Complaint which properly joined Respondent to this action. Therefore, the trial court's order granting Respondent's Motion to Dismiss should be reversed, which was based solely on the grounds that a three year statute of limitations had run.

### B. The Trial Court Misapplied the Facts of Relevant South Carolina Case Law to the Facts of this Case in Determining Whether the Guaranty Constitutes a Sealed Instrument.

In analyzing whether the Guaranty is a sealed instrument, the trial court reviewed the various different factual situations presented in three South Carolina state cases and one Fourth Circuit case. However, the trial court misapplied those facts in reaching its determination to apply a three year statute of limitations. In beginning the analysis, this Court should start with the broad and plain language of the statute that describes what language demonstrates sufficient intent to create a sealed instrument.

> "Whenever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto."

S.C. Code Ann. § 19-1-160 (2012). This is broad language to be interpreted based on the facts and circumstances presented in a given situation.

In *South Carolina Dept. of Social Services v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 320 S.E.2d 464 (S.C. Ct. App. 1984), this Court found that

the document at issue was a sealed instrument because the parties' intent to create a sealed document was manifested in that the document contained both (1) the attestation clause stating that "the parties hereto have set their hands and seals," and (2) the notation "L.S." following the parties' signatures. *Id.*, at 561, 320 S.E.2d at 467.

In *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 609 S.E.2d 548 (S.C. Ct. App. 2005), the document at issue contained only the standard attestation clause "IN WITNESS WHEREOF, the parties have hereunto set their hands and seals," without any further indication of the parties' intent to seal the document. Thus, this Court held this to be insufficient to create a sealed document. *Id.*, 363 S.C. at 172, 609 S.E.2d at 550.

In *Clifton, LLV v. Tadlock*, 2012 WL 909826, *aff'd.* 513 Fed. Appx. 255 (4th Cir. 2013), the Fourth Circuit, applying South Carolina state law, found that a lease containing only the clause "Signed, sealed and delivered," without more, did not create a sealed document, and therefore, the three year statute of limitations was applicable, rather than the twenty year statute of limitations for sealed instruments. *Id.*, 2012 WL 909826, *aff'd.* 513 Fed. Appx. 255.

Finally, in *Treadaway v. Smith*, 325 S.C. 367, 479 S.E.2d 849 (S.C. Ct. App. 1996), the document at issue contained both the standard attestation

clause, "IN WITNESS WHEREOF, the parties have hereunto set their respective Hands and Seals in quadruplicate as of the day and year first above written," as well as the clause "SIGNED SEALED AND DELIVERED IN THE PRESENCE OF," followed by the signatures of the parties to the document and witnesses. This Court found that, because the document contained both an attestation clause as well as an additional clause indicating the parties' intention to seal, the parties had sufficiently manifested their intent so as to create a sealed document. *Id.*, 325 S.C. at 378, 479 S.E.2d at 855. The trial court acknowledged this case in its Order; however, it failed to state the outcome of the case: that an attestation clause combined with another indicia of intent to seal was sufficient to create a sealed document.

The document at issue in this case is a Guaranty, which, by the trial court's own acknowledgement, contains the standard attestation clause "IN WITNESS WHEREOF, this instrument has been duly executed by the undersigned this 2 day of June, 2006," followed directly by the clause "SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF," followed by the signatures of Respondent Travaglione as guarantor and two witnesses. However, the trial court inexplicably found the document at issue to be more similar to the document in *Carolina Marine*, which

contained only the standard attestation clause "IN WITNESS WHEREOF, the parties have hereunto set their hands and seals," without any additional indicia of an intent to seal, rather than to *Treadaway*, which contained two phrases—the standard attestation clause and an additional clause—indicating the parties' intentions to create a sealed document.

The Court in *Carolina Marine* stated the well-settled point—reflecting the statutory standard of S.C. Code Ann. § 19-1-160—that "[i]f it appears from a non-sealed instrument that the parties intended for the contract to be sealed, it will be deemed sealed." *E.g.*, *Carolina Marine*, 363 S.C. at 173, 609 S.E.2d at 551. Where, as here, the fundamental question is the intent of the parties, such determination should not be addressed in the motions stage of litigation.

Considered together, *Carolina Marine*, *Treadaway*, *Clifton*, and *Winyah* stand for the proposition that more than one indicia of intent to seal is required to reflect sufficient intent to create a sealed instrument. *See Carolina Marine*, at 175, 609 S.E.2d at 552 ("Were we to construe this boilerplate attestation clause [of 'IN WITNESS WHEREOF,' and accompanying language], *by itself*, as requiring a finding of intent to create a sealed instrument in an otherwise non-sealed instrument, we would likely transform the twenty-year statute of limitations into the standard

period of limitations for contract actions in this state." (emphasis in original)). These cases clearly indicate that a standard attestation clause combined with another indication of the parties' intent to seal—either the notation "L.S." adjacent to the contracting parties' signatures or the phrase "signed, sealed and delivered" preceding such signatures—are sufficient to create a sealed document.

In the case at bar, the Guaranty contained both a standard attestation clause as well as the phrase "signed, sealed and delivered," just as the parties in *Treadaway* did. In *Treadaway,* this Court found the combination of these two clauses constitute sufficient indicia of intent as to create a sealed document. In addition, the facts discussed above—the Guaranty and Notes incorporating one another by reference and secured by Mortgages in real property, as well as the Guaranty's unambiguous language indicating the parties' intent that such Guaranty survive until the Notes are satisfied—further demonstrate that the parties intended it to be a sealed instrument.

Following the precedent of this Court, the parties intend demonstrated in the language of the Guaranty, and the courts' favoring of longer and more specific statutes of limitations over shorter or more general statutes of limitation, the twenty year statute of limitations for

sealed documents is applicable rather than the three year statute of limitations for contracts in general.

## CONCLUSION

Because the twenty year statute of limitations is applicable in this case and the Guaranty was signed only eight years before the Third-Party Complaint at issue was filed, the trial court's Order granting Respondent's Motion to Dismiss should be reversed and remanded.

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM BEAUFORT COUNTY
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Daufuskie Island Properties, LLC, and its successor in interest, Ace Basin Investments, LLC, Appellant,

v.

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**PROOF OF SERVICE**

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I certify that I have served the Initial Brief of Appellant and Designation of the Record on Raymond Travaglione by depositing a copy of it in the United States Mail, postage prepaid, on February 16, 2015, addressed to his attorneys of record, Tara E. Nauful and Dawn M. Hardesty, 211 King Street #330, Charleston, South Carolina 29401.

February 16, 2015

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February 16, 2015



**VIA HAND DELIVERY**

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

Re: *JMT Cap. Hldgs, LLC v. VDM/T Land Co., et al., LLC,*
Case No. 2014-CP-07-0380.

Dear Ms. Kitchings:

Enclosed please find one original and one copy of Appellant Daufuskie Island Properties, LLC and its successor in interest, Ace Basin Investments, LLC's Initial Brief, Designation of Matter to Be Included in the Record on Appeal, and Proof of Service. Please time stamp the copy and return it to this office in the prepaid, preaddressed envelope enclosed. If you have questions, please contact me at 843.375.6622.

Many thanks.

Sincerely,

Margarete L. Allio

Enclosures: As stated.



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