

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

TD Bank, NA, successor by merger )  
with Carolina First Bank, )

Plaintiffs, )

v. )

David H. Jacobs, )

Defendant. )

TD Bank, NA, successor by merger )  
with Carolina First Bank, )

Plaintiffs, )

v. )

David H. Jacobs and James A. McFarland, )

Defendants. )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2012-CP-40-06074

2015 MAR -2 AM 10:38  
RICHLAND COUNTY  
FILED  
JEANETTE W. HOSKINS  
C.C.P. & S.S.

Civil Action No.: 2012-CP-40-07540

ORDER

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**SC Court of Appeals**

This matter came before the Court upon Defendant Jacob's Motion for a New Trial. Case numbers 2012-CP-40-06074 and 2012-CP-40-07540 were consolidated and tried October 6 and 7, 2014. Plaintiff was represented at trial by Jody Bedenbaugh, Esquire, and Paul Collins, Esquire. Defendant Jacobs was represented at trial by Gerald Jowers, Esquire. Defendant McFarland was represented at trial by Leonard Jordan, Esquire. The jury returned a verdict in favor of the Plaintiff in the amount of \$2,867,277.14 against Defendant Jacobs in case number 2012-CP-40-06074 and in the amount of \$1,557,363.29 against Defendants Jacobs and McFarland, jointly and severally, in case number 2012-CP-40-07540. On October 17, 2014, Defendant Jacobs filed a Motion for a New Trial. On October 28, 2014, Plaintiff filed a memorandum in opposition to the motion.

**FACTUAL BACKGROUND**

Case number 2012-CP-40-06074 arose as an action to collect on a guaranty of a commercial note given in connection with a loan to fund construction of a medical office building in Newberry, South Carolina. Plaintiff filed this action against the guarantor Jacobs

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pursuant to the guaranty. Plaintiff sought at trial \$2,867,277.14 in damages for the unpaid and unrecovered principal amount, interest, and late charges associate with collection on the loan.

Case number 2012-CP-40-07540 arose as an action to collect on guarantees of a commercial note given in connection with a real estate loan to be used for development of vacant commercial property. Plaintiff filed this action against the guarantors Jacobs and McFarland pursuant to the guarantees. Plaintiff sought \$1,557,363.29 in damages for the unpaid principal amount, interest, and late charges associated with collection on the loan.

Defendant Jacobs alleged in his answer in both cases that Plaintiff breached the duty of good faith and fair dealing and was improperly suing him solely on the guaranty, not the mortgage. Based on these allegations, Defendant Jacobs sough to void the guaranty. On July 11, 2014, Defendant Jacobs filed a supplemental answer raising one additional ground for the breach of good faith and fair dealing defense: that Plaintiff sold other notes and mortgages at discounted prices to third parties with full knowledge that the borrowers and guarantors, who allegedly had special or personal relationships with the Plaintiff, will be released from liability.

On May 24, 2013, Plaintiff filed a motion for summary judgment in both cases seeking summary judgment on the defenses raised by Defendant Jacobs. On March 24, 2014, Judge Strickland entered a Form 4 order denying the motions for summary judgment. On April 3, 2014, Plaintiff filed a motion to reconsider, which was denied by a Form 4 order filed on April 23, 2014.

On August 7, 2014, Plaintiff filed a motion in limine seeking to exclude certain testimony and evidence from trial. The parties appeared on August 12, 2014 for a date certain trial. Prior to the trial, the Honorable Casey Manning heard arguments on the motion in limine. Based on the arguments and concessions made during the arguments, Judge Manning released the jury and held that Defendants would be provided the opportunity to proffer the testimony and evidence challenged by Plaintiff, and the Court would then decide the motion. The Court further held that any evidence challenged by Plaintiff that Defendants did not proffer would be excluded.

On October 3, 2014, Judge Manning issued an order granting in part and denying in part Plaintiff's motion in limine. Judge Manning denied Plaintiff's motion regarding exclusion of Defendant Jacobs' breach of the implied duty of good faith and fair dealing and breach of fiduciary duty defenses. Judge Manning granted Plaintiff's motion regarding exclusion of all evidence, testimony, or reference to the Troubled Asset Relief Program ("TARP"), government

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bailouts, and the "Heron Lakes I note sale," a specific sale of a note at an allegedly discounted price. Finally, Judge Manning denied Plaintiff's motion to exclude Defendant Jacobs' appraiser, Tom Wingard, but granted Plaintiff's motion to exclude witnesses John Hilton, Joe Hawk, and Andrew Syrett (who were not proffered), and David Hilburn (who was proffered to provide testimony on the Heron Lakes I note sale).

On October 6 and 7, 2014, the consolidated cases were tried before a jury. Following the close of Plaintiff's case in chief, Plaintiff moved for a directed verdict on its claims, seeking to have Defendant Jacobs' defenses dismissed as a matter of law. The Court denied Plaintiff's motion in part, but granted the motion on the issue of whether Plaintiff could sue on the guaranties without first foreclosing on the property securing the notes, which the Court determined Plaintiff could do under South Carolina law. Following the close of all evidence, Plaintiff again moved for a directed verdict on its claims, seeking to have the defenses dismissed as a matter of law. The Court again denied Plaintiff's motion and allowed the defenses to be submitted to the jury. The jury returned verdicts in Plaintiff's favor as follows: (1) \$1,557,363.29 against Defendants Jacobs and McFarland in case number 2012-CP-40-07540; and (2) \$2,867,277.14 against Defendant Jacobs in case number 2012-CP-40-06074.

On October 17, 2014, Defendant Jacobs filed the Motion for New Trial presently before the Court. Defendant Jacobs seeks a new trial on the grounds that Judge Manning's exclusion of evidence related to TARP and government bailouts and evidence related to the Heron Lakes I note sale, including the testimony of David Hilburn, was improper and prejudicial to his ability to establish his defenses.

### DISCUSSION

Defendant Jacobs asserts that a new trial should be granted based upon the pretrial rulings. "A new trial may be granted to all or any of the parties and on all or part of the issues...for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State." Rule 59(a), SCRPC. Initially, Defendant Jacobs argues that Plaintiff's motion in limine was based on the same arguments that it made in previously filed motions for summary judgment and motions to reconsider that were denied by Judge Strickland on March 24, 2014 and April 3, 2014, respectively. Plaintiff moved for summary judgment on the grounds that the terms of the guaranty provide that it is an independent and absolute guaranty of payment, and Plaintiff is not required to first foreclose on the collateral. Plaintiff further

argued that there can be no breach of fiduciary duty or implied covenant where Plaintiff did what its contract expressly allowed it to do.

Even if Defendant Jacobs is correct that Plaintiff made the same arguments in the subsequent motion in limine as it did in the motions for summary judgment, Judge Manning denied Plaintiff's motion in limine as it related to the exclusion of the breach of fiduciary duty and breach of the implied duty of good faith and fair dealing defenses, and those defenses were submitted to the jury for consideration at trial. Therefore, even if they were argued multiple times, it is inconsequential. The issues Judge Manning granted in the motion in limine related to the exclusion of witnesses who were not previously identified when the motions for summary judgment were argued, and the exclusion of any reference to TARP, government bailout, and Heron Lakes I note sale, which were also not raised at summary judgment. Therefore, because Defendant Jacobs has not suffered any consequences or prejudice from the same arguments allegedly being made multiple times, the Court denies the motion for a new trial on this ground.

Next, Defendant Jacobs argues that it was improper to exclude any reference, evidence, and testimony about the bailout of the banking industry. Defendant Jacobs argues that the testimony was necessary to show the background regarding Plaintiff's actions to support Defendant's defense of bad faith and unfair dealing. Following the motion in limine, Judge Manning held that the testimony was irrelevant, and if allowed to be presented to the jury, would likely confuse the jury, and could result in a verdict based on improper motives. No evidence was presented at trial or in the motion for a new trial that was not presented during the hearing on the motion in limine. This Court is unable to discover any material fact or principle of law that either was overlooked or disregarded and further finds no error of law or facts not appropriately considered. Consequently, the motion for a new trial is denied on this ground.


Defendant Jacobs also moves for a new trial on the ground that it was improper to exclude the testimony of David Hilburn regarding the Heron Lakes I note sale and any reference to the note sale. Defendant Jacobs sought to introduce testimony and evidence regarding Plaintiff's sale of a note from Heron Lakes I at a discount to Sea Ducks, LLC in May of 2013 to support his position that Plaintiff was not treating Defendant Jacobs the same way as other borrowers, violating the covenant of good faith and fair dealing. At the hearing before Judge Manning to determine whether the testimony and evidence regarding the Heron Lakes I note sale was relevant and admissible, Defendant Jacobs proffered two witnesses. Judge Manning held

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that Defendant Jacobs failed to present any evidence to establish that the Heron Lakes I note sale was relevant to the issues to be decided by the jury. No evidence was presented at trial or in the motion for a new trial that was not presented during the hearing on the motion in limine. This Court is unable to discover any material fact or principle of law that either was overlooked or disregarded and further finds no error of law or facts not appropriately considered. Defendant's motion for a new trial is denied on this basis.

**ORDER**

For the reasons stated above, Defendant Jacob's Motion for a New Trial is **DENIED**.  
**AND IT IS SO ORDERED.**

  
ALISON RENEE LEE  
Presiding Judge

February 27, 2015  
Columbia, South Carolina

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