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STATE OF SOUTH CAROLINA) JUN 17 2015 IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) SC Court of Appeals FOR THE NINTH JUDICIAL CIRCUIT

JAMES J. KERR, CRAYTON W. WALTERS)
AND KWK, LLC)
Plaintiffs,)

vs.)

FXM & COMPANY, LLC, STRUCTURTECH,)
LLC, FRANZ MEIER, INDIVIDUALLY, and)
SKYWAVES I CORP.)
Defendants.)

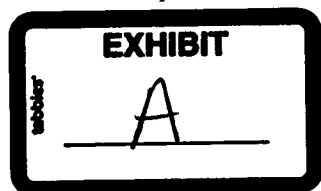
CASE NO. 2008-CP-10-1642
ORDER GRANTING
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AS TO
THE AMENDED COUNTERCLAIMS
OF FXM & COMPANY, LLC

FILED
2015 FEB -4 AM 10:20
JULIE A. HENNINGSON
CLERK OF COURTS

THIS MATTER came before me on cross motions for summary judgment as to the Amended Counterclaims of FXM & Company, LLC ("FXM"). I have reviewed the memoranda and exhibits submitted by counsel, heard oral argument, and reviewed the applicable law. I hold as follows:

A. Procedural History

FXM's counterclaims in this action were originally filed as a separate complaint (case no. 2009-CP-10-2374) against Crayton Walters, James Kerr, KWK, Ron Konersmann, and BB&T. The complaint alleged that Skywaves I. Corp. ("Skywaves") was in default under its December 18, 2003 lease with FXM and that Walters, Kerr, Konersmann and KWK were liable to FXM as secondary obligors (Kerr, Walters and Konersmann by way of guaranty agreements and KWK by way of an assignment provision in a separate lease). See Complaint in 2009-CP-10-2374. The complaint also alleged causes of action against BB&T, Skywaves' lender. Skywaves was not sued as it had filed for bankruptcy in April of 2008. The claims against BB&T were eventually dismissed. As the present action (2008-CP-10-1642) was already pending between FXM and KWK, Kerr and Walters, a rule 12(b)(8) motion to dismiss the action was filed, and a



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consent order was entered to resolve the issue and bring FXM's counterclaims into the present action. FXM's claims against Konersmann remained in case no. 2009-CP-10-2374 and were ended by Judge Stephanie P. McDonald's January 22, 2013 order granting Konersmann summary judgment. (See McDonald Order, Plaintiffs' Exh. A). Judge McDonald held that the Konersmann as guarantor and secondary obligor had no liability to FXM as the primary obligor, Skywaves, had no liability to FXM. Defendants Kerr and Walters were dismissed by this Court's order of August 15, 2013 as FXM conceded Judge McDonald's order would bar claims against Konersmann's fellow guarantors, Kerr and Walters.

KWK advances its summary judgment on the grounds that it is a secondary obligor and Judge McDonald's Order requires the dismissal of FXM's claims against KWK.

B. The nature of FXM's claims

FXM's first three counterclaims relate to Kerr and Walters and are now moot. The fourth, fifth and sixth counterclaims state, against KWK, claims for breach of contract, promissory estoppel, and unjust enrichment / quantum meruit. FXM concedes is not a party to the lease between KWK and Oz, and thus has no breach of contract claim. FXM further concedes it does not now and has never had an interest in the KWK property the subject of the OZ/KWK lease. No evidence was presented and no oral argument was made as to the claims for promissory estoppel or unjust enrichment, rather FXM argued that it was an intended third party beneficiary of a lease agreement between KWK and Oz Technology, Inc. ("Oz") (See Oz/KWK Lease Plaintiffs' Exh. B). FXM relies on Paragraph 11 of the lease, which states in relevant part:

KWK, LLC ("KWK") and Oz Technology, Inc. ("Oz") acknowledge that pursuant to the terms of that certain lease "the "Lease") dated December 18, 2003 between Skywaves Corporation ("Skywaves") as tenant and FXM and Company, LLC("FXM"), FXM as Landlord is entitled to received all lease payments due have under the event of a

default of Skywaves under said Lease. KWK and Oz agree that Oz shall be authorized and directed to make all lease payments to FXM upon receiving notice from FXM that a default has occurred under the said Lease and that FXM is entitled to receive payments due hereunder.

FXM's claim against KWK is predicated on FXM having a valid claim against Skywaves for Skywaves' default of its lease. In other words, it is FXM's claim that because Skywaves failed to pay FXM that FXM has a claim against KWK pursuant to Paragraph 11 above.

C. Judge McDonald's Order - FXM has suffered no damages

FXM has suffered no loss as it has been fully compensated for any alleged default of Skywaves. In the companion case against Ron Konersmann, another secondary obligor, (case no. 2009-cp-10-2374), FXM submitted that its loss as a result of the breach by Skywaves was \$1,202,805.53. (McDonald Order, Plaintiffs' Exh. A, page 3). In her order granting Konersmann summary judgment as to FXM's claims, Judge McDonald held that the \$900,000.00 claimed by FXM for repairs are not recoverable as the principal of FXM testified under oath that no monies had been spent to make any repairs. Judge McDonald further found that the most FXM could therefore claim was \$302,805.53. *Id.* Judge McDonald then held that FXM, as a result of the \$400,000.00 it was paid by Skywaves as a security deposit, had in its possession \$387,912.80. (McDonald Order, Plaintiffs' Exh. A, page 6). Finally, Judge McDonald held that even if she accepted everything FXM claims as damages, FXM would actually owe Skywaves \$85,107.27 (\$387,912.80 – 302,805.53) as the Skywaves lease mandates that the security deposit shall be applied to any sums due to FXM in the event of Skywaves' default. *Id.*

FXM claims it must only provide notice of Skywaves' default to KWK to trigger the obligation to forward the OZ rent payments to FXM. This contention flies in the face of the assignment provision. The plain language of the assignment provision states that "pursuant to the



terms” of the lease between FXM and Skywaves, KWK is obligated to turn over rent payments received from OZ in the “event of a default of Skywaves.” As the terms of the lease between Skywaves and FXM provide that the security deposit is to be applied to satisfy rent owed by Skywaves to FXM, KWK is not obligated to turn over any rent payments until Skywaves was actually in default and owed FXM money. As FXM’s damages never eclipsed the security deposit, FXM is not entitled to payments from KWK. Further, even were I to accept FXM’s argument, FXM has suffered no damages as it has been paid through the security deposit more than its loss as a result of Skywaves’ default. (McDonald Order, Plaintiffs’ Exh. A, page 6).

When faced with the arguments above, FXM’s counsel claimed at the hearing on September 15, 2014 that FXM never received the \$400,000.00. This is contrary to the holding of Judge McDonald.¹ She held that as FXM received the \$400,000.00 security deposit from Skywaves, the secondary obligors are not liable to FXM as FXM has been overcompensated for its loss by over \$85,000.00. *Id.* As a result, there is no default on the lease by Skywaves and therefore no obligation owed by KWK to FXM. FXM is estopped from contradicting the unappealed findings of Judge McDonald. *See Beall v. Doe*, 281 S.C. 363, 371, 315 S.E.2d 186, 191 (Ct. App. 1984)(Where an issue was actually litigated and directly determined in a prior action and where the issue was necessary to support the first judgment, collateral estoppel bars the relitigation of the issue).

D. The Assignment Provision as an Obligation Secondary to that of Skywaves

The assignment of rents to FXM is made "pursuant to the terms of that certain lease ... between Skywaves Corporation ('Skywaves') as tenant and FXM and Company, LLC ('FXM'), FXM as Landlord is entitled to receive all lease payments due hereunder in the event of a default

¹ Further, Skywaves actually filed an adversary action in the Bankruptcy Court against FXM to recover the \$400,000.00 security deposit. (Bankruptcy Order, Plaintiff’s Exh. C)



of Skywaves under said Lease." (See Oz/KWK Lease Plaintiffs' Exh. B ¶ 11)(emphasis added). In other words, had Skywaves performed its obligation under its lease with FXM, KWK's obligation to assign rents would be discharged. This is the very definition of primary and secondary obligations, i.e. where performance of the underlying obligation discharges all duties owed by the secondary obligor. See Restatement (Third) of Suretyship & Guaranty §§ 39, 43 (1996). Similarly, in the subrogation context, the South Carolina Supreme Court in *Walker v. Queen Ins. Co.*, 136 S.C. 144 (1926) has held that subrogation rights arise where performance of the secondary obligation is conditioned upon the default of the primary obligor. Therefore, as KWK's obligation is secondary to that of Skywaves, FXM must have a valid claim against Skywaves in order to recover from KWK. In addition to the holding of Judge McDonald, such a claim does not exist for the following reasons:

i. Skywaves Bankruptcy - Background Facts

FXM purchased commercial property at 4280 Pace Street (the "Premises") on December 18, 2003, and immediately entered into the Lease with Skywaves. Per the terms of the Lease, FXM received a \$400,000 security deposit from Skywaves. Skywaves' lender terminated its line of credit account in January 2008, causing substantial financial problems for the company. On March 5, 2008, FXM sent written correspondence to Skywaves declaring the Lease to be in default as of November 2007. On April 7, 2008, Skywaves filed for bankruptcy. FXM filed claims against Skywaves in Bankruptcy for its alleged breach of its lease with FXM and Skywaves filed an adversary complaint to recover the \$400,000 security deposit actually paid to FXM.



ii. Bankruptcy Court Order

On August 11, 2011, the Bankruptcy Court dismissed both Skywaves' adversary complaint to recover the return of the \$400,000 security deposit it paid to FXM and FXM's claims against Skywaves. (Bankruptcy Order, Plaintiff's Exh. C) In the Order, there is no reservation of claims against the alleged secondary obligor, KWK, and the claims of FXM against Skywaves are dismissed. Id.

While the Order provides the claims are dismissed without prejudice, the claims bar date was July 23, 2008. (Bankruptcy Docket, Plaintiff's Exh. D). Therefore, the withdrawal by FXM of its claims was a dismissal of its claims against Skywaves with prejudice as the claims could not be re-filed.

Where the primary obligation has been discharged one secondarily liable is also discharged as a voluntary release of the principal obligor or an accord and satisfaction of the principal obligor's liability discharges the secondary obligor unless the secondary obligor's liability is expressly reserved. See Restatement (Third) of Suretyship and Guaranty § 39 (1996). The reasoning for this rule is articulated in Williston on Contracts:

Generally, to avoid unfairness to the principal obligor and its guarantors, where the creditor releases a principal, thereby discharging the principal debt, the guarantors are likewise relieved of liability, as the release of the principal obligor would be illusory if the guarantors were not relieved of liability to the creditor and could seek indemnity from the principal for the performance of the guarantees, and the guarantors would be prejudiced if the principal obligor's release eliminated their rights to seek full indemnity without discharging their own liability as well.

See 3 Williston on Contracts § 61:12 (4th ed. updated 2013) citing *Green Leaves Restaurant, Inc. v. 617 H Street Associates*, 974 A.2d 222 (D.C. 2009). FXM's release of Skywaves released



KWK.

iii. Running of the Statute of Limitations

Irrespective of the dismissal and the passing of the claims bar date, which released any secondary obligor, if a statute of limitations runs on the primary obligation, the secondary obligor cannot be sued:

If the obligee fails to institute action against the secondary obligor until after the obligee's action against the principal obligor is barred by the running of the statute of limitations the secondary obligor's rights and duties with respect to the principal obligor are the same as if the obligee had released the principal obligor without preserving the secondary obligor's recourse against the principal obligor.

Restatement (Third) of Suretyship & Guaranty § 43 (1996). The purpose of the rule in this section is to protect the secondary obligor from unfair consequences that might otherwise flow from the obligee's choice to pursue the secondary obligor after the cause of action against the principal obligor expires. Id. As stated above, FXM's claims against Skywaves are barred by the 3 year statute of limitations as the underlying debt by FXM's admission was incurred in November of 2007, the date FXM claims Skywaves defaulted on its lease.

FXM claims that KWK waived its right to assert the statute of limitations as a defense to its claims by way of a consent order of dismissal filed in case no. 2009-cp-10-2374. The consent order states:

It appearing that the present action as to Jimmy Kerr, Crayton Walters, and K WK, LLC can be properly brought within Case No. 08-CP-1 0-1642, it is ordered that the claims asserted against Jimmy Kerr, Crayton Walters, and KWK, LLC, are dismissed without prejudice and with express leave being granted to FXM & Company, LLC to file, within thirty (30) days of this date of this signed and filed Order, its answer and counterclaims against such defendants within action No. 08-CP-10-1642...

The consent order goes on to state:

The three Defendants named above agree that they will not assert defenses such as laches, waiver or statute of limitations, as a result of this agreed upon consolidation, nor will these Defendants assert that the Plaintiffs claims are subject to the jurisdiction of the bankruptcy court.

(emphasis added). KWK is not asserting the statute of limitations as a result of the consolidation of FXM's claims into this action, nor is KWK asserting the bankruptcy court has jurisdiction over FXM's counterclaims. The consent order does not bar KWK from asserting that because FXM allowed the statute of limitations to run on the primary obligor, Skywaves, that the statute has run as to the secondary obligor, KWK.

E. Conclusion

The KWK obligation to FXM is secondary to that of the principal, Skywaves. As FXM has released the principal and allowed the statute of limitations on its claims against the principal to expire, and as Judge McDonald has held that FXM has suffered no damages as a result of Skywaves' default of its lease, I hereby GRANT Plaintiffs' motion for summary judgment.


The Honorable Michael R. Scarborough
Master in Equity

On this ^{9th} day of Feb. 2015
Charleston, SC