FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2013-CP-10-6439

Wells Fargo Bank, N.A., Successor by Merger to Wachovia Bank, National Association
PLAINTIFF(S)

Robert L. Freeman
DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

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 or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ 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 CIRCUIT COURT RULING IN THIS APPEAL.

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)
N/A		$

If applicable, describe the property, including tax map information and address, referenced in the order:
N/A

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.**

Circuit Court Judge

2117
Judge Code

6/2/15
Date

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Wells Fargo Bank, N.A., Successor by Merger to Wachovia Bank, National Association,

Plaintiff,

vs.

Robert L. Freeman,

Defendant.

IN THE CIRCUIT COURT

Case No. 2013-CP-10-06433

ORDER GRANTING PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter came before the Court on May 5, 2015, for hearing on the parties' cross-motions for partial summary judgment on the statute of limitations defense asserted by the Defendant. The Plaintiff, Wells Fargo Bank, N.A. ("Wells Fargo"), was represented at the hearing by its attorneys, Robert C. Byrd and A. Smith Podris, and the Defendant, Robert L. Freeman ("Freeman"), was represented by his attorneys, G. Trenholm Walker and Katie Fowler Monoc. Based on the pleadings, affidavits, memoranda of law submitted by both parties, the arguments of counsel, and the applicable law, the Court hereby grants Wells Fargo's Partial Motion for Summary Judgment and denies Freeman's Motion for Partial Summary Judgment.

FINDINGS OF FACT

This case arises out of a series of commercial loans (the "Loans") made by Wells Fargo in 2006 and 2007 to six different entities in which Freeman was a principal member. All the Loans were secured by mortgages on real estate, and all the Loans were personally and unconditionally guaranteed by Freeman.

In April 2010, all the Loans were amended pursuant to written loan modification agreements. Specifically, the loan modifications provided for interest-only monthly payments

and extended the maturity date of each of the Loans to June 15, 2011, at which time all unpaid amounts were due and payable in full.

In Fall of 2010, the borrowers stopped making the interest payments agreed to in the loan modifications. On November 22, 2010, Wells Fargo's lawyer sent the borrowers and Freeman a letter for each of the Loans advising them that the Loans were in default and reserving Wells Fargo's rights and remedies. On December 7, 2010, Wells Fargo's lawyer sent additional letters to the borrowers and Freeman notifying them that the default rate of interest would begin to accrue on each of the Loans. Finally, on May 19, 2011, Wells Fargo's lawyer sent letters to the borrowers and Freeman notifying them that Wells Fargo had elected to accelerate the balance of each of the Loans, and giving them until June 17, 2011 to pay the Loans in full.

From 2010 through 2013, Wells Fargo and Freeman worked together in a cooperative effort to reduce the outstanding balance of the subject Loans. Certain of the mortgaged properties were eventually sold by Freeman through private "short sales", to which Wells Fargo consented under certain terms and conditions outlined in letters executed by the borrowers and Freeman, and the rest of the mortgaged properties were sold through foreclosure actions in three different counties.

On October 30, 2013, after completion of the short sales and foreclosure sales, Wells Fargo commenced this action against Freeman, seeking a judgment for the unpaid deficiency amounts that remained due. In January 2015, Freeman was allowed to amend his Answer to assert the affirmative defense that the statute of limitations had run prior to the filing of the action.

Each of the written guaranties executed by Freeman contain the following attestation clause: "**IN WITNESS WHEREOF**, Guarantor, on the day and year first written above, has

caused this Unconditional Guaranty to be executed under seal." This attestation clause is a one-sentence stand-alone paragraph located on the signature page just above Freeman's signature line. The words "**IN WITNESS WHEREOF**" at the beginning of the clause are in bold and capitalized font.

In addition, the word "(SEAL)" appears next to Freeman's signature line, beneath which line appears Freeman's printed name "Robert L. Freeman". The word "(SEAL)" is in all capital letters.

STANDARD OF REVIEW

Rule 56, SCRCP, requires the entry of summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). Although the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, "this initial responsibility may be discharged by 'showing' – that is, pointing out to the trial court – that there is an absence of evidence to support the nonmoving party's case." *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Once the moving party makes this demonstration, the opposing party "must, under Rule 56(e), do more than simply show some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a *genuine issue for trial.*" *Id.* (emphasis in original); *Midland Mutual Life Ins. Co. v. Harrell*, 331 S.C. 394, 397, 503 S.E.2d 189, 190 (Ct. App. 1998). The nonmoving party must specifically set forth such facts "as would be admissible in evidence" to show that a true jury issue exists. Rule 56, SCRCP.

Importantly, Defendant carries the burden of proof for his affirmative defenses. *Cole v. S. C. Elec. & Gas, Inc.*, 355 S.C. 183, 195, 584 S.E.2d 405, 412 (Ct. App. 2003,) *aff'd as modified*, 362 S.C. 445, 608 S.E.2d 859 (2005) (citing *Lorick & Lowrance, Inc. v.. Julius H.*

Walker & Co., 153 S.C. 309, 318, 150 S.E. 789, 792 (1929)) ("When a defendant interposes an affirmative defense, he becomes as to that matter the actor in the suit, and the burden of proof rests upon him to establish his affirmative defense by the preponderance of the evidence.").

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003); *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001). Here, both parties have moved for summary judgment on the statute of limitations issue, agreeing that there are no genuine issues of material fact for trial on this issue.

CONCLUSIONS OF LAW

The statute of limitations applicable to "an action upon a sealed instrument, other than a sealed note and personal bond for the payment of money only" is twenty (20) years. S.C. Code Ann. §15-3-520(2). This Court finds and concludes that the guaranties executed by Freeman are "sealed instruments" and that the exception(s) do not apply. Accordingly, this action is subject to a twenty-year statute of limitations and therefore was timely filed as a matter of law.

1. The Guaranties are "Sealed Instruments".

In determining whether an instrument is a "sealed instrument" for purposes of Section 15-3-520(2), the Court is restricted to the language used in the instrument itself:

> 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 (emphasis added).

Each of the guaranties executed by Freeman, which are virtually identical, contains multiple indicia that the parties intended that the guaranties be "sealed instruments". First, each

guaranty contain the same attestation clause expressly indicating the intent to seal: **"IN WITNESS WHEREOF**, Guarantor, on the day and year first written above, *has caused this Unconditional Guaranty to be executed under seal.*" (emphasis added). This clause is conspicuously set apart from the rest of the text by the bold and capitalized font of the words at the beginning of the one-sentence paragraph. Second, the word "(SEAL)" conspicuously appears in all capital letters next to Freeman's signature, further evidencing the parties' intent that the guaranties be under seal.

In *South Carolina Dep't of Soc. Servs. v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 561, 320 S.E.2d 464, 467 (Ct. App. 1984), the Court of Appeals held that the contracts at issue in that case "clearly" were sealed documents such that an action upon the contracts would fall within the twenty-year statute of limitations provided by Section 15-3-520(2). In determining that the contracts were executed under seal, the Court of Appeals focused on the fact that the contracts contained an attestation clause stating that "the parties hereto have set their hands and seals", which the Court held evidenced an intent to seal. Moreover, the documents contained the notation "L.S."[1] following the signatures of the parties.

More recently, in *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005), the Court of Appeals considered whether a lease agreement was executed "under seal" so as to fall within the twenty-year statute of limitations. However, because the *only* reference to "seal" was in the "hands and seals" attestation clause, the Court of Appeals found that the lease agreement did not sufficiently evidence that it was executed under seal. *Id.* at 363 S.C. 174-75; 609 S.E.2d 551-52.

[1]L.S. is an abbreviation for Locus sigilli, meaning "the place of the seal; the place occupied by the seal of written instruments", and it serves the same purpose as a seal. *Carolina Marina Handling, Inc. v. Lasch*, 363 S.C. 169 at 174, 609 S.E.2d 548 at 551 (2005) (citing Black's Law Dictionary, 948 (6th ed. 1990) and 68 Am.Jur. *Seals* §6 (2004)).

Importantly, the Court of Appeals in *Lasch* emphasized that the holding was limited to documents where the parties relied upon the "boilerplate [hands and seals] attestation clause, by itself". *Id.* (emphasis in original). Unlike the agreement in *Lasch*, the guaranties in this case do not rely upon the "hands and seals" type of attestation provision to evidence intent to seal, but instead unequivocally and conspicuously state that Freeman "*has caused this Unconditional Guaranty to be executed under seal.*" (emphasis added).

Moreover, unlike *Lasch*, where the only to "seal" was the "boilerplate hands and seals" attestation provision, the guaranties executed by Freeman also contain the conspicuous notation "(SEAL)", in all capital letters, next to Freeman's signature line. As the Court of Appeals held in the *Winyah Nursing Homes* case, the use of a similar notation "clearly" evidences an intention that the instrument be sealed.

Finally, like the sealed agreement at issue in *Treadaway v. Smith*, 325 S.C. 367 (Ct. App. 1996), the guaranties at issue in this matter involve "future, contingent obligations." *Lasch*, 363 S.C. at 173; 609 S.E.2d at 551. Specifically, the guaranties secure performance of all of the obligations outlined in the underlying notes and mortgages, including those not involving the payment of money.

Freeman relies upon, in part, the federal district court's decision in *Midwest Dredge & Excavating, Inc. v. Bay Pointe Homeowner's Assoc.*, 2007 U.S. Dist. LEXIS 99536, 2007 WL 7141921 (D.S.C. May 15, 2007). However, this Court finds the district court's ruling to be distinguishable.

First, the federal court appears to have ignored the well-settled law in South Carolina and elsewhere that "L.S." and "SEAL" are in fact interchangeable. In *Wallingford v. Western Union Tel. Co.*, 60 S.C. 201, 38 S.E. 443 (1901), the Supreme Court held that a deposition transcript

was properly "sealed" where the notary's certificate included the language "Witness my hand and official seal" and the notary public attached the word "Seal" to the jurat of the deposition. *See also Cook v. Cooper*, 59 S.C. 560, 38 S.E. 218 (1901) (holding that a deed was properly executed under seal where it contained the notation "seal" after the grantor's signature). In addition, both Black's Law Dictionary and the Am.Jur. 2d *Seals* article, which were both cited as authoritative by the Court of Appeals in *Lasch*, acknowledge that "(SEAL)" may be used in place of "L.S" with the same effect.

In addition, the federal court seemed to conclude that the appearance of the words "(PRINCIPAL)" and "(SURETY)", in parentheses, just prior to the word "(SEAL)" created some sort of ambiguity in that contract about whether the parentheticals were intended to simply mark the location on the page where a seal would have been placed if the parties had intended for the document to be under seal. Here, the word "(SEAL)" appears next to Freeman's signature line, below which his printed name appears, and there are no "stray parentheticals" similar to the ones in *Midwest Dredge*.

Finally, the federal court placed much emphasis on the anticipated six-month duration of the agreement to find that the parties did not intend for the twenty-year statute of limitations to apply. Here, however, the guaranties were executed as part of several mortgage loan transactions and undertook to guarantee performance of the covenants included in those notes and mortgages. Like sealed instruments, mortgage loan transactions also are subject to a twenty-year statute of limitations pursuant to Section 15-3-520, thus making the covenants of a note and mortgage enforceable for at least twenty years. Because the guarantor's future, contingent obligations can reasonably be expected to last as long as the underlying loan documents he guaranteed, this case is distinguishable from *Midwest Dredge*, where the federal court found that

a twenty-year statute of limitations "would serve no purpose in the context of a performance bond for the completion of contractual work which was scheduled to take less than six months to complete."

Because the guaranties executed by Freeman contain not only an intentional and clear attestation clause but also the legally recognized "(SEAL)" in substitution of an actual physical seal, the Court finds and concludes that they fall within Section 19-1-160 and are therefore subject to the twenty-year statute of limitations.

The Court further finds and concludes that the exception(s) in Section 15-3-520(2) for "sealed notes and personal bonds for the payment of money only" do not apply to the guaranties in this case. Our Supreme Court has noted that guaranty agreements are not categorically excluded from Section 15-3-520(2). *See Transouth Financial Corp. v. Cochran*, 324 S.C. 290, 478 S.E.2d 63 (1996) (referring to a guarantor's liability on a guaranty after a confession against a borrower had expired and stating that "*pursuant to [Section 15-3-520(2)], an action upon a sealed instrument may be brought within the prescribed twenty year period.*") (emphasis added). The guaranties are neither "notes" nor "personal bonds" as described in the statute. Moreover, the guaranties expressly guaranteed performance of all obligations of the borrowers under the various Loans, which included multiple obligations other than "the payment of money only."

The principal rule of statutory construction is to apply the intent of the legislature. *Bass v. Isochem*, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005). Legislative intent must prevail where it can be reasonably ascertained in the language of the statute. *McClanahan v. Richland County Council,* 350 S.C. 433, 567 S.E.2d 240 (2002); *Ray Bell Constr. Co. v. School Dist. of Greenville County,* 331 S.C. 19, 501 S.E.2d 725 (1998). Courts must look to the plain language of the statute in determining the legislative intent, *Bass v. Isochem*, 365 S.C. 454, 617 S.E.2d 369 (Ct.

App. 2005), while reading the statute "in a sense which harmonizes with its subject matter and accords with its general purpose," *Univ. of S. Cal. v. Moran*, 365 S.C. 270, 276, 617 S.E.2d 135, 138 (Ct. App. 2005). Where a statute's terms are "clear and unambiguous on their face," the court must apply the literal meaning of the statute. *Id.* Importantly, "If there is any doubt as to which of two statutes [of limitation] applies, that doubt must be resolved in favor of the longest period, according to the great weight of authority." *State v. Life Ins. Co. of Georgia*, 254 S.C. 286, 299, 175 S.E.2d 203, 209–10 (1970).

While Section 15-3-520(2) does not define "sealed notes and personal bonds for the payment of money only" the usual and customary meaning of the term "personal bond" appears to be different from the usual and customary meaning of the term "guaranty", both in the modern sense of those terms, and as those terms were used historically. A "bond" creates a *primary* obligation on the part of the obligor, more akin to a promissory note, 11 C.J.S. *Bonds* § 2 (2014), whereas a "guaranty" creates a *secondary* obligation to perform in the event of the failure to perform by one who is primarily liable. 38A C.J.S. *Guaranty* § 1 (2014).

Moreover, the Supreme Court has held that where a sealed instrument involves an obligation *in addition to* the payment of money, the exception does not apply, and the limitations period is twenty years. *See Stelts v. Martin*, 90 S.C. 14, 72 S.E. 550 (1911); *Strain v. Babb*, 30 S.C. 342, 9 S.E. 271 (1889). In *Strain v. Babb*, the plaintiff sued the administrator of the Clerk of Court's estate and the sureties on the official Clerk of Court's bond, based on allegations that the Clerk of Court improperly executed his duties, causing harm to the plaintiff. In holding that the 20-year limitations period applied to the bonds, the Court reasoned that even the breach of the bond sounded in money damages, and the penalty was for a specific amount, the bond was "other than for the payment of money in the sense of the statute." *Id.* The Court noted that the

bond was "in the nature of a covenant, a contract under seal, by which the obligors thereto bound themselves under the specified penalty to answer for the neglect of duty, if any, on the part of the clerk." *Id.*

Here, the guaranties executed by Freeman provide that he was expressly guaranteeing the "timely payment *and performance of all liabilities and obligations* of the Borrower" under any Loan Documents, which are defined in the guaranties as expressly including security agreements and mortgages (emphasis added). The "Guaranteed Obligations" not only included the repayment of the loan indebtedness, but also included performance of various covenants under the Loan Documents, such as compliance with applicable environmental laws, enforcement of leases, subleases, and easements on the collateral property, maintenance of adequate property insurance, and maintenance of the collateral properties in good condition and repair. By their express terms, the guaranties assumed obligations greater than "the payment of money only".

The South Carolina General Assembly could have expressly excluded "sealed guaranties" from the scope of the Section 15-3-520(2), but chose not to do so. It is not the province of the Court to rewrite statutes where a statute's terms are "clear and unambiguous on their face." *Univ. of S. Cal. v. Moran*, 365 S.C. 270, 276, 617 S.E.2d 135, 138 (Ct. App. 2005). Importantly, "If there is any doubt as to which of the two statutes [of limitation] applies, that doubt must be resolved in favor of the longest period, according to the great weight of authority." *State v. Life Ins. Co. of Georgia*, 254 S.C. 286, 299, 175 S.E.2d 203, 209-10 (1970).

Accordingly, for the reasons set forth herein, the Court finds and concludes that the statute of limitations defense asserted by Freeman is insufficient as a matter of law, and Wells Fargo is entitled to summary judgment on this issue.[2]

[2] In light of the Court's ruling that the statute of limitations is twenty years, it is not necessary to decide the other arguments presented by the parties, including whether the so-called mandatory acceleration provision in the

AND IT IS SO ORDERED.

J.C. Nicholson, Jr.
Circuit Court Judge

Charleston, South Carolina
June ~~May~~ 2, 2015

guaranty agreements was self-executing or required affirmative election by the lender, whether Freeman acknowledged the debt through writing or partial payments in a manner sufficient to "restart" the statute of limitations, or whether the execution of the guaranties in connection with mortgages makes them subject to a twenty-year statute of limitations, even if they were not executed under seal.