FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2014 CP-32-04259

ORIGINAL

Wells Fargo, N.A. as successor by merger to Wachovia Bank, National Association

PLAINTIFF(S)

Don A. Numy, II, Dee S. Nummy, and Don A. Nummy

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. ☐ See Page 2 for additional information.

☐ 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 : Denying defendant's motion for summary judgment and granting plaintiff's motion to strike jury demand

INFORMATION FOR THE JUDGMENT 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)
		$
		$
		$

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.**

Circuit Court Judge

2756
Judge Code

5/4/2015
Date

For Clerk of Court Office Use Only

This judgment was entered on the 18 day of May, 2015 and a copy mailed first class or placed in the appropriate attorney's box on this 18 day of May 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Louise M. Johnson

ATTORNEY(S) FOR THE PLAINTIFF(S)

Richard Gleissner

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth Camgg/mh

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

Case No. 2014-CP-32-04259

Wells Fargo, N.A. as successor by merger to Wachovia Bank, National Association,

Plaintiff,

vs.

Don A. Nummy, II, Dee S. Nummy, and Don A. Nummy,

Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S MOTION TO STRIKE JURY DEMAND

This matter is before me on Defendant Don A. Nummy, II's, Defendant Dee S. Nummy's, and Defendant Don A. Nummy's (collectively, "Defendants") Motion for Summary Judgment and Plaintiff Wells Fargo, N.A. as successor by merger to Wachovia Bank, National Association's ("Plaintiff") Motion to Strike Defendants' Jury Demand. A hearing was held before me on April 22, 2015. Plaintiff appeared through its attorneys, John G. Tamasitis and Stanley H. McGuffin, and Defendants appeared through their attorney, Richard R. Gleissner. As set forth more fully below, Defendant's Motion for Summary Judgment is denied and Plaintiff's Motion to Strike Defendants' Jury Demand is granted.

This case is an action for suit on guaranties signed by Defendants in connection with a promissory note that was executed by Danco Construction, Inc. ("Danco") on July 25, 2006, and delivered to Plaintiff in the original amount of Six Hundred Thousand and 00/100 ($600,000) Dollars (the "Note"). Defendants executed and delivered to Plaintiff identical Unconditional Guaranty agreements (the "Guaranty Agreements"), pursuant to which Defendants guaranteed the

1 of 7

payment and performance of each and every debt of Danco. (Complt., Exhs. B and C.) Danco subsequently defaulted on the Note, and Plaintiff made demand upon the Defendants for payment on January 21, 2011. Defendants refused payment, and Plaintiff subsequently filed its Complaint on November 19, 2014.

Defendants' Motion for Summary Judgment asserts Plaintiff's action is barred by the statute of limitations. Plaintiff's Motion to Strike Defendants' Jury Demand was based on the grounds that Defendants had, as part of the Guaranty Agreements, waived their rights to a jury trial. For the reasons set forth below, this Court denies Defendants' Motion for Summary Judgment and grants Plaintiff's Motion to Strike the Jury Demand.

I. The Statute of Limitations Does Not Bar Plaintiff's Claims Because the Guaranty Agreements Were Executed Under Seal.

Defendants' contend in their motion that S.C. Code Ann. § 15-3-530 sets forth the applicable three-year state of limitations for this action. Defendants are correct that, as a general rule, a three-year statute of limitations applies to contract actions in South Carolina. *See* S.C. Code Ann. § 15-3-530(1). However, when an instrument is executed under seal, S.C. Code Ann. § 15-3-520 provides that the appropriate statute of limitations is twenty years after the cause of action accrues. Thus, the dispositive issue here is whether the Guaranty Agreements executed by Defendants were under seal.

S.C. Code Ann. § 15-3-520(b) provides, in relevant part, that "an action upon a sealed instrument, other than a sealed note and personal bond for the payment of money only" must be brought within twenty years. Defendants' rely on our Court of Appeals' decision in *Carolina Marine Handling v. Lasch*, 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005) for the proposition that words contained in mere boilerplate clauses are not indicia of the intent of the parties to create a

"sealed instrument." Further, Defendants argue that the Guaranty Agreements were not executed under seal because nowhere in the Guaranty Agreements is there a seal affixed to the documents.

At the outset, it is true that there is not a physical seal affixed to any of the Guaranty Agreements at issue in this case. However, S.C. Code Ann. § 19-1-160 unambiguously provides:

> 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.

(emphasis added). "The clear language of section 19-1-160 imposes a statutory rule of evidence and requires that the determination of whether a non-sealed instrument should be considered a sealed instrument be gleaned from the instrument." *Carolina Marine Handling, Inc.*, 363 S.C. at 173, 609 S.E.2d at 550-51. If it appears from the instrument that the parties intended for the instrument to be sealed, then the court will deem it sealed. *Id.* at 173, 609 S.E.2d at 551. Therefore, we must look to the Guaranty Agreements themselves to determine if the parties intended for the documents to be executed under seal.

Both Guaranty Agreements contain identical attestation clauses that state:

IN WITNESS WHEREOF. Guarantor, on the day and year first written above, has caused this Unconditional Guaranty to be executed under seal.

[signatures of parties] (**SEAL**)

(Compl., Exh. B, at p. 6 and Exh. C, at p. 6.)

In *Carolina Marine Handling, Inc.*, the Court of Appeals explained that a "boilerplate attestation clause, *by itself*," is not enough to establish the intention of the parties to execute an instrument under seal. 383 S.C. at 175, 609 S.E.2d at 552 (emphasis in original). Indeed, the court cautioned that if such a boilerplate clause required a finding of intent to create a sealed instrument,

then it "would likely transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state." *Id.* Thus, the court held that the availability of the twenty-year limitations period under S.C. Code Ann. § 15-3-520 exists only "where the contract clearly evidences an intent to create a sealed instrument." *Id.*

Here, the Guaranty Agreements do not merely contain boilerplate attestation clauses, but they also noted "(**SEAL**)" next to the parties' signatures. The Court of Appeals construed a similar instrument in *South Carolina Department of Social Services v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 320 S.E.2d 464 (Ct. App. 1984). In that case, following the standard language in the attestation clause "the parties hereto have set their hands and seals," the contract noted "L.S." next to the parties' signatures. *Id.* at 561, 320 S.E.2d at 467. The inclusion of L.S. was significant because, as explained by the court in *Carolina Marine Handling*, L.S. was an abbreviation for "*Locus sigilli*," which means "'the place of the seal; the place occupied by the seal of written instruments.'" *Carolina Marine Handling, Inc.*, 363 S.C. at 174, 609 S.E.2d at 551 (discussing the holding in *Winyah Nursing Homes*). For that reason, the Court of Appeals held that the parties' intended for the contract to be a sealed instrument. *Winyah Nursing Homes*, 282 S.C. at 556, 320 S.E.2d at 467.

The Guaranty Agreements in this case are similar to the instrument in *Winyah Nursing Homes* and show that the parties intended the agreements to be sealed instruments. Not only do they contain language in the attestation clause that the agreements were "to be executed under seal," but they also note "SEAL" next to the parties' signatures. As was the case in *Winyah Nursing Homes*, this language is significant and, perhaps, even more so here because the agreements use common language to evidence the parties' intention for the Guaranty Agreements to be executed under seal.

Accordingly, the Guaranty Agreements are deemed to have been executed under seal and the twenty-year statute of limitations, as provided in S.C. Code Ann. § 15-3-520, applies to this action. Therefore, because Plaintiff's suit on the Guaranty Agreements was brought within twenty-years after its causes of action accrued, it is not barred by the statute of limitations and Defendants' Motion for Summary Judgment is denied.

II. Defendants Waived Their Right to a Jury Trial in the Guaranty Agreements

Finding that Plaintiff's cause of action is not barred by the statute of limitations, the Court now turns its attention to Plaintiff's Motion to Strike Defendants' Jury Demand. In their Answer and Counterclaim, Defendants made a demand for a jury trial. It is well established in South Carolina that "'[a] party may waive the right to a jury trial by contract.'" *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 332, 755 S.E.2d 437, 443 (2014) (quoting *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 63, 566 S.E.2d 863., 866 (Ct. App. 2002)). "A person who signs a contract or other written document cannot avoid the effect of the document by claiming that he did not read it." *Id.* at 332-33, 755 S.E.2d at 443 (citing *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003)). South Carolina law does not "impose a duty on the bank to explain to an individual what he could learn from simply reading the document." *Id.* (citing *Citizens & S. Nat'l Bank of S.C. v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994)).

The Guaranty Agreements signed by the Defendants contain identical jury trial waivers:

> **WAIVER OF JURY TRIAL.** TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF GUARANTOR BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS GUARANTY, THE LOAN

> DOCUMENTS OR ANY AGREEMENT CONTEMPLTED TO BE EXECUTED IN CONNECTION WITH THIS GUARANTY, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS GUARANTY. EACH OF THE PARTIES AGREES THAT THE TERMS HEREOF SHALL SUPERSEDE AND REPLACE ANY PRIOR AGREEMENT RELATED TO ARBITRATION OF DISPUTES BETWEEN THE PARTIES CONTAINED IN ANY LOAN DOCUMENT OR ANY OTHER DOCUMENT OR AGREEMENT HERETOFORE EXECUTED IN CONNECTION WITH, RELATED TO OR BEING REPLACED, SUPPLEMENTED, EXTENED OR MODIFIED BY, THIS GUARANTY.

(Compl., Exh. A, at p. 6; Exh. B, at p. 6.) By signing the Guaranty Agreements, Defendants are charged with having read their contents.

Further, the jury trial waivers are conspicuous and unambiguous, and therefore, Defendants knowingly and voluntarily waived their rights to a jury trial. Indeed, in *Blackburn*, our Supreme Court held that virtually identical jury trial waivers were conspicuous and unambiguous because "[u]nlike the other provisions in the . . . guaranties, the waivers are printed in all capital letters and have a bold heading called '**WAIVER OF JURY TRIAL.**' They are located at the very end of the six-page document, directly above the signature line, thus making the conspicuous font even more noticeable, even at a quick glance." *Blackburn*, 407 S.C. at 333 n.8, 755 S.E.2d at 443 n.8. Similarly, the jury trial waivers in this case, unlike the other provisions in the Guaranty Agreements, have bold headings called "**WAIVER OF JURY TRIAL**" and they are located at the very end of the six-page Guaranty Agreements, directly above the signature lines.

Finally, Defendants' counterclaims are covered by the jury trial waivers. The *gravamen* of Defendants' breach of contract counterclaim is that Plaintiff breached the covenant of good faith and fair dealing when it refused to extend any further credit to Danco under the original promissory

note. (Def. Don A. Nummy II Answer and Countercl. p. 5, at ¶¶ 29-30; Defs. Dee S. Nummy and Don A. Nummy Answer and Countercl. p. 5, at ¶¶ 29-30.) As a result, Defendants assert that this breach of contract "created a substitute contract and/or imposed risk on the Defendants fundamentally different" from the original agreement, thus, giving rise to Defendants' second counterclaim for surety defenses. (Def. Don A. Nummy II Answer and Countercl. p. 6, at ¶ 39; Defs. Dee S. Nummy and Don A. Nummy Answer and Countercl. p. 6, at ¶ 39.) The jury trial waivers apply to these counterclaims because the waivers cover "any litigation based on, or arising out of, under or in connection with . . . the loan documents or any agreement contemplated to be executed in connection with this guaranty, or any course of conduct, course of dealing . . . or actions of any party with respect hereto." (Compl., Exh. A, at p. 6; Exh. B, at p. 6.) Therefore, Defendants cannot avoid the effects of the jury trial waivers, and the waivers are enforceable and applicable to all of the Defendants' counterclaims.

Based on the foregoing, Defendants' Motion for Summary Judgment is **DENIED** and Plaintiff's Motion to Strike Defendants' Jury Demands is **GRANTED**.

AND IT IS SO ORDERED.

Tanya A. Gee

May 4, 2015

7 of 7